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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Speedy Trial Clause of the Sixth Amendment applies to a period when a person is not under arrest or formal accusation of a crime.

2. Whether respondent's constitutional rights were violated by the delay between the commission of the crime and the return of the indictment.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-27a) is reported at 632 F.2d 258. The opinion and order on denial of rehearing (App. C, *infra*, 29a-49a) is reported at 635 F.2d 1115. The opinion of the district court (App. D, *infra*, 50a-73a) denying respondent bail pending appeal is reported at 485 F. Supp. 1087.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 28a) was entered on July 29, 1980. A petition for rehearing was denied on December 18, 1980 (App. C, *infra*, 29a). On February 10, 1981, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, respondent was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. The court of appeals reversed the convictions and ordered dismissal of the indictment on the ground that respondent's Sixth Amendment right to a speedy trial had been violated.

1. When the murders of which he was convicted were committed, respondent was a physician holding the rank of captain in the United States Army Medical Corps and was stationed at Fort Bragg, North Carolina. In the early morning of February

17, 1970, respondent's wife and two daughters were bludgeoned and stabbed to death in respondent's quarters at the Fort Bragg military reservation.[1] Respondent informed the military police that he had been awakened by the screams of family members, and that four unknown assailants had attacked him and knocked him unconscious. The Army Criminal Investigation Division (CID) and other authorities immediately began an investigation of the crime. Shortly after the murders, respondent gave investigating officers a detailed account of his actions upon regaining consciousness and discovering the bodies.

The investigators uncovered a great deal of physical evidence in the apartment. For example, fibers from the pajama top that respondent was wearing on the night of the murders were found in various areas of the apartment. And the fact that each member of the MacDonald family had a different blood type enabled the investigators to identify the source of each blood stain that was found. By April 6, 1970, it became apparent to CID investigators that many aspects of respondent's story were inconsistent with the physical evidence. Accordingly, on that day respondent was advised of his rights and informed that he was a suspect. He was relieved of his medical duties and restricted to quarters. On May 1, 1970, the Army formally charged respondent with murder, pursuant to Article 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 830.

As required by Article 32 of the UCMJ, 10 U.S.C. 832, an investigating officer was appointed to investigate the charges and to recommend whether

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[1] The early background of this case is set out in the decisions rendered before trial. *United States* v. *MacDonald*, 531 F.2d 196, 200-201 (4th Cir. 1976), rev'd, 435 U.S. 850 (1978).

they should be referred to a general court-martial for trial. Following the Article 32 hearing, the investigating officer filed a report recommending dismissal of the charges and further investigation by civilian authorities. On October 23, 1970, after review of the report, the Commanding General of respondent's unit accepted the recommendation and dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial. See *Manual for Courts-Martial, United States* ¶ 33f (rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship. Respondent then moved to California and established himself as a practicing physician (App. D, *infra*, 55a).

At the request of the Department of Justice the CID continued its investigation. The investigation was quite extensive, involving several hundred interviews and numerous forensic tests of the victims' clothing and other physical evidence found at the crime scene. In June 1972, the CID transmitted to the Justice Department a massive thirteen-volume report recommending still further investigation (435 U.S. at 851). After the raw report had been examined by several persons within the Department, the CID was requested to investigate some undeveloped leads. The CID then conducted more interviews and scientific tests and forwarded supplemental reports to the Department on November 9, 1972, and August 20, 1973. In late May 1974, after further study, the government determined that many unanswered questions in the complex case could be resolved only by use of the investigative powers of a grand jury. Therefore, in August 1974, a grand jury of the United States District Court for the Eastern District

of North Carolina was empanelled. On January 24, 1975, the grand jury indicted petitioner on three counts of premeditated murder.

2. Prior to trial, respondent moved to dismiss the indictment on several grounds including double jeopardy and denial of the right to a speedy trial. The district court denied these motions. On the speedy trial question, the court, relying on *United States* v. *Marion*, 404 U.S. 307 (1971), concluded that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." See 435 U.S. at 852.

Finding that the issue could properly be appealed before trial, the court of appeals reversed and remanded with instructions to dismiss the indictment on speedy trial grounds. 531 F.2d 196 (1976). The court viewed the preferral of military charges against respondent on May 1, 1970, and the attendant restriction of his movement as "the functional equivalent of a civilian arrest" (531 F.2d at 204). Accordingly, it held that the Sixth Amendment guarantee of a speedy trial attached at that time. Because petitioner remained under suspicion and felt obliged to retain a lawyer after the military charges were dismissed, the court noted that his "freedom from detention" during the years prior to his arrest after indictment "did not, from a practical standpoint, dispel the effects of the government's initial accusation" (*ibid.*). Therefore, the court held that the delay of more than four and one half years between the military accusation and the indictment triggered the balancing analysis outlined in *Barker* v. *Wingo*, 407 U.S. 514 (1972), for violations of the Sixth Amendment right to a speedy trial.

Applying the *Barker* analysis, the court of appeals conceded that the government had not deliberately delayed charging respondent in order to hamper the defense (531 F.2d at 205-206). However, the court found that the government had provided no satisfactory explanation for the delay between the transmittal of the CID report to the Department of Justice in June 1972 and the empanelling of the grand jury in August 1974; instead this delay was ascribed to "indifference, negligence, or ineptitude" (531 F.2d at 207). The court also stated that respondent "reasonably asserted his right to a speedy trial" (*ibid.*). Finally, the court found that respondent had been prejudiced by the delay because of the need to retain counsel, the anxiety produced by the threat of a new prosecution, and the expectation that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*id.* at 207-208). The court concluded that a weighing of these factors indicated a violation of respondent's Sixth Amendment right to a speedy trial (*id.* at 208).

Judge Craven dissented (531 F.2d at 209-214). He reasoned that because the military charges against respondent had been dismissed in October 1970, and because respondent had "stood under no 'public accusation' " during the four-year period prior to the indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment in January 1975 was incorrect (*id.* at 212-213). Judge Craven viewed respondent's claim as one alleging a violation of due process as a result of pre-indictment delay,

which he found unsupported by evidence of actual prejudice (*id.* at 214).[2]

After the Fourth Circuit denied a petition for rehearing en banc by a 3-3 vote, this Court granted certiorari. The Court reversed on the ground that an interlocutory appeal may not be taken from the denial of a motion to dismiss on speedy trial grounds. 435 U.S. 850 (1978). In light of its holding on the appealability issue, the Court did not reach the government's contention that the court of appeals had erred in applying the protections of the Sixth Amendment to the entire period from the military accusation to the indictment. 435 U.S. at 863 n.9. On remand, the court of appeals held that a trial on the federal indictment would not violate the Double Jeopardy Clause. 585 F.2d 1211 (1978).

3. After respondent's trial and conviction by a jury, he moved to vacate the conviction and dismiss the indictment on speedy trial grounds. The district court denied this motion (App. E, *infra*, 74a-75a), setting forth its reasons in a decision denying respondent bail pending appeal (App. D, *infra*, 50a-73a). First, the court pointed out that respondent

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[2] Judge Craven also disputed the majority's conclusion that respondent had been subject to the civilian equivalent of arrest as the result of the preferral of military charges and his restriction to quarters. He reasoned that, although a probable cause determination is a prerequisite to an arrest as the term is used in the Sixth Amendment context, no such determination is necessary for preferral of charges under military law. Judge Craven concluded that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither of which warrants invocation of the Sixth Amendment's speedy trial guarantee. 531 F.2d at 210-213.

had suffered neither "oppressive pretrial incarceration" nor "great anxiety and concern" because of the pre-indictment delay in that he had spent the majority of the period establishing himself in the practice of medicine in California (*id.* at 54a-55a). Then, noting that it had paid specific attention during the trial to the possibility of prejudice to the defense because of the delay (*id.* at 53a), the court stated that "[t]he fears expressed by the Fourth Circuit in its 1976 decision that [respondent's] ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial" (id. at 55a).[3] In the absence of any prejudice, the court concluded that respondent's speedy trial claim should be denied.

A divided court of appeals reversed (App. A, *infra*, la-27a). The court explicitly adopted the reasoning of the first panel with respect to three of the *Barker* factors—the length of the delay, the reason for the delay, and respondent's assertion of his speedy trial right (*id.* at 4a). It went on to discuss each of these factors briefly. The court emphasized that the "military arrest" of respondent triggered his speedy trial right and thus that the relevant delay was the entire period between "the military arrest and trial" (*ibid.*). The court noted, however, that the "most offending delay" was the two-year period between the transmission of the CID report to the Justice Department

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[3] Specifically, the court observed that the only material witness who died during the delay was a government witness, that several witnesses "vital to the defense" would have been either unknown or unavailable if the trial had been conducted shortly after commission of the offense, and that respondent had not alleged any particular in which his defense was prejudiced by the delay (App. D, *infra*, 55a-56a).

and the institution of the grand jury proceeding (*id.* at 8a). The court characterized this delay as the product of "sheer bureaucratic indifference" (*id.* at 7a).

Turning to the question of prejudice to the defense at trial, the court noted that "[t]he substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place" (App. A, *infra*, 11a). Citing the "almost certain memory erosion" of the witnesses (*id.* at 14a) and the difficulty that respondent would have had, in light of the nine-year delay,[4] in testing the consistency of prosecution witnesses' trial testimony with their original statements, given the risk that the prosecutors had bolstered their recollection in preparing for trial (*id.* at 10a), the court concluded that there was a "substantial possibility that [respondent's] defense was prejudiced by the delay" (*id.* at 14a). In particular, the court noted that the testimony of Helena Stoeckley, a defense witness, "had a great potential for prejudice" (*id.* at 11a). Stoeckley had made vague and contradictory remarks to third parties on several occasions in the past that indicated that she was present in respondent's apartment during the murders, but had testified at trial, consistent with other earlier statements that she had made, that her mind was essentially blank as to her activities on the night of the murders. Although the court acknowledged that, within a week of the murders, Stoeckley had told a neighbor that she had no recollection of her activities on the night of the crime

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[4] The court acknowledged that not all of the nine-year delay was attributable to the government, but nonetheless remarked that "all of it contributed to the fading of memories" (App. A, *infra*, 10a n.2).

and that, "[h]er memory has resembled a lightbulb not screwed tight, blinking on and off" (*id.* at 13a), it concluded that the possibility, indeed the probability, that unreasonable delay was the cause [of Stoeckley's memory gap] cannot be excluded" (*id.* at 13a-14a). The court then noted that the amount of trial prejudice necessary to demonstrate a speedy trial violation depends on the other *Barker* v. *Wingo* factors. Balancing all of those factors, the court of appeals concluded that respondent's Sixth Amendment rights had been violated (*id.* at 16a-17a).

Judge Bryan dissented. First, he disputed the court's view that the lapse of time between the commission of the crime and the indictment was inexcusable. In light of the complexity of the case, Judge Bryan found that the deferral of the submission of the case to the grand jury was "well advised" (App. A, *infra*, 21a). Both the government's interest in the investigation and considerations of fairness to the respondent dictated that a grand jury not be convened until the government had gleaned all available evidence (*id.* at 21a-22a). Judge Bryan also rejected the court's conclusion regarding prejudice at trial, finding that respondent's ability to defend himself was in no way prejudiced by the delay (*id.* at 23a-27a).[5]

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[5] Focusing specifically on witness Stoeckley's inability to recall her activities on the night of the murders, Judge Bryan observed that she had testified that her memory gap resulted from her consumption of large quantities of drugs that night, and that the statements concerning the murders that she had made during the intervening years were "vague, fragmented and contradictory" (*id.* at 26a). Thus, the record in no way indicated that the passage of time had weakened Stoeckley's recollection of the events of February 17, 1970; rather, her own testimony indicated "a pre-existing gap in her ability to recount those events" (*id.* at 26a-27a & n.5).

4. The Fourth Circuit denied the government's petition for rehearing en banc by a 5-5 vote. Chief Judge Haynsworth dissented with a brief statement and Judges Russell, Widener, Hall and Phillips filed a fuller dissenting opinion (App. C, *infra*, 29a-47a). In that opinion, the dissenting judges focused on what they deemed the panel's error in including as relevant to the Sixth Amendment inquiry the period between the dismissal of military charges against respondent in October 1970 and his indictment in January 1975. During this period, the dissent explained, respondent was not under arrest, indictment or any other form of legal accusation and thus there was no hearing or other proceeding pending that he could demand be held speedily; in short, "there was nothing to which a claim for a speedy trial could attach" (*id.* at 33a). Citing decisions of other courts of appeals on this point, the dissent concluded that a Sixth Amendment speedy trial claim cannot be predicated upon delay that occurs when a defendant is not subject to any restraint or legal accusation. Rather, if a defendant is prejudiced by such a delay, his claim is one of violation of due process under the Fifth Amendment (*id.* at 38a-39a).

The dissenters went on to address the Sixth Amendment question on the assumption, *arguendo*, that the panel had correctly identified the relevant period of delay. First, they concluded that, in light of the complexity of the case and the need to proceed with great care so as not to absolve a guilty party or unfairly charge an innocent party, the government was not guilty of excessive delay in beginning the prosecution (App. C, *infra*, 41a-44a). Second, with respect to the prejudice resulting from the delay, the dissenters explained that respondent had not suffered

oppressive pretrial incarceration nor any anxiety different from that suffered by any person under criminal investigation nor, as explained in Judge Bryan's dissent, any prejudice to his defense as a result of the pre-indictment delay (*id.* at 45a-46a).

Chief Judge Haynsworth expressed his "tentative agreement" with the government's contention that the period between the dismissal of the military charges against respondent and the return of the indictment is irrelevant for Sixth Amendment purposes (App. C, *infra*, 29a-30a). Judge Murnaghan, author of the panel opinion, filed a statement (*id.* at 48a-49a) clarifying that the panel considered in its Sixth Amendment analysis only the delay prior to the January 1975 indictment; it was conceded by respondent that the delay between the indictment and trial was not the responsibility of the government. See App. A, *infra*, 19a n.2; 531 F.2d at 202.

REASONS FOR GRANTING THE PETITION

1. This case presents an important and recurring question concerning the scope of the Sixth Amendment guarantee of a speedy trial. The court of appeals' inclusion in its speedy trial calculations of the period from October 1970 to January 1975, during which time respondent was not under arrest, indictment, or any other legal restraint, seriously misconstrues this Court's decisions in *United States* v. *Marion*, 404 U.S. 307 (1971), and *Dillingham* v. *United States*, 423 U.S. 64 (1975), and conflicts with decisions of several other courts of appeals. Moreover, the court of appeals' decision, if allowed to stand, will have a substantial detrimental impact upon the effective administration of the criminal laws by inhibiting prosecutors from exploring all avenues of inquiry, both

favorable and unfavorable to a suspect, before proceeding with criminal charges.

a. In *United States* v. *Marion*, *supra*, and *Dillingham* v. *United States*, *supra*, this Court held that the right to a speedy trial guaranteed by the Sixth Amendment is activated only by a formal accusation of a crime, either by indictment, information, or arrest. As was explained in *Marion* (404 U.S. at 320; emphasis supplied):

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and *holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment.

See also 404 U.S. at 321 & n.13; *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977). It necessarily follows from this rationale that the right to a speedy trial is not implicated during the period after charges against an accused have been dismissed and he has been released from custody. At that point, he no longer stands under public accusation or suffers interference with his liberties. And there can be no Sixth Amendment obligation speedily to try a person when there are no charges pending against him that can be brought to trial.[6]

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[6] Thus, in *Dillingham* v. *United States*, *supra*, the Court ruled that the protections of the Speedy Trial Clause were implicated during a period when charges were pending

The decision of the court of appeals abandons these settled principles in applying the Sixth Amendment to the period after the dismissal of the military charges against respondent in October 1970, even though he was honorably discharged from the military and was free from any restraints on his liberty during this period. The only justification given in any of the opinions of the court of appeals for the inclusion of this period is the fact that respondent remained under suspicion for the crime and therefore suffered anxiety that he might be prosecuted and the continuing expense of retaining counsel. See 531 F.2d at 204; see also App. C, *infra*, 49a (statement of Murnaghan, J., on petition for rehearing). These same considerations, however, are equally present where a person who has not been arrested or indicted knows that he is the subject of a serious criminal investigation. Nonetheless, the Court in *Marion* expressly declined to extend the Sixth Amendment's protection to such a situation. 404 U.S. at 321. Treating the consequences of investigation as equivalent to those of a formal accusation obliterates the very distinction drawn in *Marion*. See *United States* v. *Elsbery*, 602

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against the defendant after his arrest, even though he had not yet been indicted. The importance of the fact that the defendant in *Dillingham* was at all times subject to outstanding charges was highlighted in the government's memorandum in that case (No. 74-6738). Although we conceded that the court of appeals there appeared to have misapplied *Marion* in failing to consider the delay between arrest and indictment (at 4-7), we noted in addition (at 7 n.5):

> Of course, if the complaint had been dismissed and petitioner had subsequently been indicted, the period between those two events, during which no charges were outstanding, would not be includable in the period of delay for purposes of the speedy trial analysis.

F.2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979).

In rejecting the clear implication of *Marion*, the court below reached a result that directly conflicts with decisions of other courts of appeals. In *United States* v. *Martin*, 543 F.2d 577 (6th Cir. 1976), cert. denied, 429 U.S. 1050 (1977), the defendant was charged with an offense in August 1972, but those charges were dismissed in January 1973. He was subsequently indicted in December 1974. In rejecting the defendant's claim that his Sixth Amendment right to a speedy trial had been denied, the court stated (543 F.2d at 579): "Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time."

Similarly, in *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir. 1972), the defendant was reindicted on federal charges after the initial charges against him brought under District of Columbia law had been dismissed on jurisdictional grounds. In rejecting the claim that the defendant's right to a speedy trial had been violated, the court declined to consider for speedy trial purposes the period after the first prosecution had been terminated but before the second had begun. Noting that "during this time appellant was a free man against whom no prosecution was pending," the court concluded that "[w]hen a citizen stands neither arrested nor indicted for an offense, he 'suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer.' United States v. Marion, [404 U.S.] at 321." 463 F.2d at 891. And, in analogous cases, the Second, Ninth and Tenth Circuits have also expressed the view that the relevant speedy trial

period does not run uninterrupted from the time of institution of charges, when the initial charges are subsequently dismissed. *United States* v. *Hillegas*, 578 F.2d 453, 457-458 (2d Cir. 1978);[7] *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978);[8] *United States* v *Stoker*, 522 F.2d 576, 579-580 (10th Cir. 1975).[9]

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[7] *Hillegas* technically involved the application of the district court's local prompt disposition rules rather than the Sixth Amendment. The court of appeals explicitly noted, however, that those rules "seek to implement the accused's constitutional right to a speedy trial," and therefore that it was "constrained by the admonition [in *Marion*] that 'it is either a formal indictment or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.' " 578 F.2d at 457. Thus, it is clear that the court's analysis with respect to the period between dismissal of the complaint and reindictment is fully applicable to cases such as this one and would necessitate a result contrary to the one reached by the court below. See also *United States* v. *McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976); *United States* v. *Flores*, 501 F.2d 1356, 1359-1360 (2d Cir. 1974).

[8] The Ninth Circuit has since suggested that *Arnold*, which involved the period between a mistrial and a later reindictment, would not necessarily be controlling where the dismissal of the original charges does not follow the declaration of a mistrial. *United States* v. *Henry*, 615 F.2d 1223, 1233 n.13 (1980).

[9] The Fourth Circuit is not completely alone in its view that a period when no charges are pending may be relevant in computing the length of delay for speedy trial purposes. At least where a second indictment charges the same offense, the Fifth Circuit has stated that the period relevant to a speedy trial calculation dates from the return of the first indictment. *United States* v. *Nixon*, 634 F.2d 306, 309 (5th Cir. 1981); *United States* v. *Avalos*, 541 F.2d 1100, 1108-1109 n.13 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

b. In addition to the conflict created among the circuits, the decision below will have a substantial adverse impact on the administration of the criminal justice system. As this Court pointed out in *United States* v. *Lovasco*, *supra*, 431 U.S. at 791-796, there are sound reasons for not requiring a prosecutor to file criminal charges as soon as probable cause is established to his satisfaction, or, indeed, even when he believes that he has assembled sufficient evidence to prove guilt beyond a reasonable doubt. By the same token, there are a variety of legitimate reasons for dismissing charges after a person has been arrested. The government may decide not to pursue the case because subsequent and considered judgment determines that the evidence, although it establishes probable cause, may not be sufficient to persuade a jury of guilt beyond a reasonable doubt; or something may occur that alters the basis for the original decision to file charges, such as a witness becoming unavailable or new evidence coming to light; or other, non-evidentiary factors may indicate that a criminal proceeding would not be in the public interest. Cf. *United States* v. *Lovasco*, *supra*, 431 U.S. at 793-794. Such dismissals are beneficial to both the defendant and the government. A defendant is released from a pending charge and its attendant anxiety, expense and infringement of liberty. The government is given an opportunity to continue its investigations and to reassess its decision not to prosecute if new evidence is discovered.

Under the court of appeals' decision that a defendant's speedy trial rights, once triggered by an arrest

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But see *United States* v. *Davis*, 487 F.2d 112, 116 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974) (*Barker* v. *Wingo* speedy trial analysis applied only to delay after the return of the second indictment).

or formal charge, continue to run despite a dismissal of the charges, such dismissals will be discouraged. Prosecutors will be induced to bring cases to trial to avoid the risk of dismissal on speedy trial grounds even when it might otherwise be appropriate to dismiss the charges pending further investigation. The consequence will be that, in some cases, persons will be brought to trial who would never have been tried at all if an investigation had been given time to run its course. In other cases, guilty defendants will be acquitted because of the government's inability in the short time after arrest to develop compelling proof of guilt. Even if the prosecutor does elect to dismiss the charges in order to develop additional evidence, the investigation will have to be conducted in a hurried atmosphere. Moreover, law enforcement officials will be dissuaded from reopening cases in light of the discovery of new evidence of guilt, even though prosecution would not be barred by the statute of limitations, because of a fear that a conviction would not stand in the face of a speedy trial claim based upon charges long ago dismissed.[10]

2. The conclusion that the Sixth Amendment is not implicated by the delay between the dismissal of the military charges and the return of the indictment does not leave unfair prosecutorial delay beyond judicial scrutiny. Rather, the correct analysis is

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[10] We note in this connection that there is no period of limitations applicable to the grave offenses with which respondent was charged. 18 U.S.C. 3281. See *United States* v. *Provenzano*, 423 F. Supp. 662, 664-666 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (where statute provides for death penalty, 18 U.S.C. 3281 applies even though death penalty cannot constitutionally be imposed) (dictum). Nevertheless, the indictment here was returned within five years from the date of the slayings.

under the Due Process Clause of the Fifth Amendment. As this Court has explained, a lengthy delay prior to accusation violates the Fifth Amendment if it both causes actual prejudice to the defense and is the product of fundamentally unfair government conduct—for example, if the delay is an intentional device to gain a tactical advantage over the accused. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 788-796 & n.17; *United States* v. *Marion*, *supra*, 404 U.S. at 324; see also, *e.g.*, *United States* v. *Elsbery*, *supra*, 602 F.2d at 1059. Thus, a subsidiary question is presented here whether respondent's constitutional rights were violated by the pre-indictment delay—either under the Fifth Amendment or, if contrary to our contention the period during which no charges were pending is counted for speedy trial purposes, under the Sixth Amendment.[11]

Although the court below did not explicitly consider the applicability of the Fifth Amendment (App. A, *infra*, 2a), we think it clear from the record and from the opinions below that respondent's due process rights were not violated by the delay; indeed, we submit that, even assuming *arguendo* that the court of appeals was correct in including the total pre-indictment delay in the Sixth Amendment analysis, the delay here does not constitute a speedy trial violation under the standards set out in *Barker* v. *Wingo*, 407

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[11] There can be little doubt that, unless this period is counted against the government, there is no Sixth Amendment violation here. The period between the preferral of the military charges and their dismissal is too short to trigger the Sixth Amendment analysis. The delay between indictment and trial, as respondent has always conceded (see 531 F.2d at 202), was not the fault of the government but rather was caused by respondent's pretrial appeals.

U.S. 514 (1972).[12] First, as both dissents below pointed out (App. A, *infra*, 21a-22a; App. C, *infra*, 41a-44a), the government was pursuing its investigation during this period and, in light of the complexity of the case and the desire not to charge an innocent party, its delay in seeking an indictment was justified. Second, as the dissenters and the district court found (App. A, *infra*, 23a-27a; App. C, *infra*, 45a-46a; App. D, *infra* 55a), respondent has not demonstrated any significant possibility that his defense at trial was prejudiced by the delay. No potential defense witness became unavailable to testify at trial as a result of the delay.[13] Moreover, the evidence on

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[12] As Judge Craven's dissent in the Fourth Circuit's first opinion (531 F.2d at 209-214) points out, the threshold determination that respondent's speedy trial right attached when he was charged by the military and restricted to quarters in May 1970 is not free from doubt. Assuming that the Sixth Amendment speedy trial guarantee applies to military court-martial proceedings (cf. *Ex parte Quirin*, 317 U.S. 1, 40 (1942)), it is not clear that respondent was "arrested" within the meaning of *Marion* and *Dillingham*. No probable cause determination was necessary in order to prefer charges against him. See 531 F.2d at 211-212; Article 30 of the UCMJ, 10 U.S.C. 830. Moreover, the restriction on respondent's liberty was not equivalent to pretrial restraint in the civilian context. Although he was restricted to his room in a bachelor officer's quarters and relieved of his duties as a medical officer, he was not taken into custody and was allowed considerable freedom of movement. See 531 F.2d at 213 & n.16. We are not, however, seeking review of this narrow issue, and we assume for the purpose of this petition that the protections of the Sixth Amendment were triggered when respondent was charged in May 1970.

[13] The assertion of the court below that the delay probably caused defense witness Stoeckley's failure to testify that she was present at the murders does not withstand analysis. Nothing in the record supports the remarkable suggestion

which respondent was convicted consisted "solely of highly technical circumstantial evidence" (App. A, *infra*, 16a). The reliability of such evidence does not diminish over time, nor does the ability of defense experts to challenge its significance.

It follows, *a fortiori*, that the pre-indictment delay here did not violate due process. Even giving the court of appeals' opinion the reading most favorable to respondent, it is manifest that no Fifth Amendment violation can be established under the standard of *United States* v. *Lovasco*, *supra*. The court of appeals pointed only to possibilities of prejudice to the defense at trial; it implicitly conceded that no actual prejudice had been shown (see App. A, *infra*, 11a, 16a). With respect to the reasons for the delay, it has never been suggested that the government deliberately delayed seeking an indictment in order to gain a tactical advantage over the defense (see 531 F.2d at 205-206). Even assuming that part of the delay was attributable to "negligence" (531 F.2d at 207) or "bureaucratic indifference" (App. A, *infra*, 7a), the government's action manifestly did not violate "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.'" *United States* v. *Lovasco*, 431 U.S. at 790. Accordingly, neither of the prerequisites

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that the mere passage of time could erase the memory of so significant an event as being present at these murders. On the contrary, as Judge Bryan explained (App. A, *infra*, 26a-27a), the record reveals that, less than a week after the crime, Stoeckley was unable to remember where she had been on the night of the murders; her testimony at trial was the result of a pre-existing gap in her memory that had nothing to do with the delay.

to a finding of a due process violation by reason of pre-indictment delay—actual prejudice or unfair delay—is present here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5253

UNITED STATES OF AMERICA, APPELLEE

vs.

JEFFREY R. MACDONALD, APPELLANT

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

Franklin T. Dupree, Jr., Chief Judge

Argued: February 5, 1980 Decided: July 29, 1980

Before BRYAN, Senior Circuit Judge; MURNAGHAN and SPROUSE, Circuit Judges.

MURNAGHAN, Circuit Judge:

Jeffrey R. MacDonald appeals convictions for second degree murder of his wife and one of his children and first degree murder of his other child. He has raised a number of issues as to the conduct of the trial and the rulings at trial by the district judge. He has also contended that his Sixth Amendment guarantee of speedy trial had been violated, and that

there was delay so inexcusable and prejudicial as to have denied him the due process mandated by the Fifth Amendment.

Deciding as we do that MacDonald is correct on his Sixth Amendment contention, we do not reach the district judge's conduct and rulings at trial or the Fifth Amendment issue. With respect to the district judge's conduct and rulings at trial, it suffices to note that the case was a sensational, drawn-out one, both hotly contested and bristling with difficult issues. The district judge's handling of the heavy demands placed on him was admirable.

MacDonald's due process contention would require a demonstration that the delay was inexcusable and that actual prejudice occurred. *United States* v. *Lovasco*, 431 U.S. 783 (1977). The requisite proof to make out a Sixth Amendment violation is no greater, and, if anything, on the facts of this case would be less, than that required to establish a Fifth Amendment violation. Under either amendment, unreasonable delay, covering essentially the same time frame must be shown. The presence of the probability of prejudice completes the necessary proof under the Sixth Amendment; the actuality of serious prejudice must be made out to validate a claim of denial of due process. Consequently, as the burden on MacDonald to show an abuse of constitutional proportions under the Sixth Amendment could not be greater than his burden under the Fifth Amendment, there is no occasion to address the due process argument.

The Supreme Court in recent years has provided specific criteria for the balancing tests necessary to determine a Sixth Amendment speedy trial issue. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Court said:

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530.

In the same opinion, the Court identified three of the interests against which prejudice is measured:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. at 532.

On MacDonald's Sixth Amendment claim, we do not write on a clean slate. Prior to trial, MacDonald took an interlocutory appeal, and succeeded on the speedy trial issue, only to have the victory evaporate when the Supreme Court determined that, procedurally the matter was not ripe for review prior to trial. *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976) (opinion by Butzner, J., joined by Russell, J; Craven, J., dissenting), *reversed on prematurity grounds*, 435 U.S. 850 (1978), [hereafter *MacDonald, First*].

Now, following trial and conviction, we are called upon again to address the question answered in MacDonald's favor by this Court in 1976.

The United States advances the argument that all of the criteria announced in *Barker* must be viewed in a different light from that in which the criteria were considered in this Court's 1976, *MacDonald, First* opinion. The reason, it contends, is that there has been a jury trial in the interim and the facts developed at trial bear on the issues created by the four *Barker* factors.

The United States is only partially correct. The questions necessarily posed by the first three *Barker* factors were in the same posture both before and after trial. It is only the fourth factor, the question of prejudice, that must be viewed differently.

Since the Court's admirable resolution of these issues has not been affected by the facts developed at the intervening trial, we adopt the reasoning of *MacDonald, First* on the issues concerning the effect of the length of delay; the government's reason for the delay; and MacDonald's assertion of his right.

Length of Delay

The offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the military arrest and trial. The military arrest was equivalent to civilian arrest and MacDonald was "subjected to 'actual restraints imposed by arrest and holding to answer a criminal charge.'" 531 F.2d at 204. It is inconsequential that the delay was the result of the accumulative action by a military and a civilian arm of government. "The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution." *Id.*

The government argues that *MacDonald, First* was incorrect in stating that a 13-volume report of the Army's Criminal Investigation Detachment forwarded by the CID to the Justice Department in June, 1972, was accompanied by a recommendation of prosecution. However, the United States Attorney for the Eastern District of North Carolina made the recommendation that the matter be submitted to a grand jury within six months of June, 1972, yet nothing occurred until presentation to a grand jury began in August, 1974. In the interval the CID filed two supplemental reports analyzing the significance of physical evidence recovered at the scene of the crime on or shortly after February 17, 1970, the date of the tragic occurrence. The CID had balked at a request by the Justice Department for an additional investigation, suggesting instead the convening of a grand jury.

Viewing the situation as a whole, the unwarranted bureaucratic delay which *MacDonald, First* found had taken place is fully established regardless of the fact that suggestion of grand jury presentation came from the CID, not in June 1972, but at some later time. The Justice Department was in possession of all the evidence from June 1972, and that is what is determinative as to the excessiveness of delay, not whether it had advice from some other government agency to take the step which is committed to it by law, and for which it is particularly equipped to make the requisite decision.

The government also has argued that the reasoning of Judge Butzner's opinion in *MacDonald, First*, may not stand in light of the subsequent holding by the Supreme Court in *United States* v. *Lovasco*, 431 U.S. 783 (1977). However, that case involved facts

different in a determinative way from those presented in the instant case. Lovasco's involvement in crime came to the government's attention almost immediately, just as in MacDonald's case. Yet there are two vital distinctions. First, a postal inspector's report was prepared linking Lovasco to the offenses one month after they were committed. In MacDonald's case over two years elapsed before the CID completed its report and forwarded it to the Justice Department. Seventeen months after the postal inspector's report was prepared, Lovasco was indicted. Prior to that time, there had been no arrest, no attendant publicity prior to the indictment. Thus, there was a second distinction of controlling importance between Lovasco's case and MacDonald's. MacDonald had been subjected to the interference with his life and affairs of the Army's arrest and investigation under conditions of extremely intrusive publicity. Lovasco was put to no similar interference prior to his indictment. As a consequence, the Supreme Court held in *Lovasco* that there was presented no viable speedy trial claim under the Sixth Amendment,[1] and turned its attention solely to the alternative assertion: that due process guaranteed by the Fifth Amendment had been denied. In MacDonald's case there was the kind

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[1] The Supreme Court stated: "In *United States* v. *Marion*, 404 U.S. 307 (1971), this Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections' of that provision. *Id.* at 320." 431 U.S. at 788-89.

of "arrest and holding to answer a criminal charge" which brings the Sixth Amendment into play. 531 F.2d at 202-04.

Thus, pre-indictment delay was deemed altogether irrelevant under the Sixth Amendment in *Lovasco*, whereas, being post-arrest in MacDonald's case, as well as pre-indictment, it is relevant. But, if the 17 month delay in *Lovasco* had been relevant, it was far more excusable than the delay of over two years in MacDonald's case. The latter was the product of sheer bureaucratic indifference and therefore weighs heavily against the government. In Lovasco's case there were other persons, whose involvement was evident, and whose likely criminality was apparent. Delay to explore possibilities of bringing the others to book contemporaneously with Lovasco was excusable. The investigation was properly describable as incomplete, and the Supreme Court accepted that the need for more investigation and the actual conduct of more investigation were established. In MacDonald's case, on the contrary, no further investigation was undertaken. Internally, the government conducted tests on evidence already long since obtained at the scene of the crimes, and lawyers in the Justice Department vacillated over and postponed decision on whether to seek indictment.

As did the *MacDonald, First* panel, we conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance of assessing MacDonald's claim that he has been denied a speedy trial."

The Reason for the Delay

For eighteen months after the dismissal of the charges by the Army, the CID, at the request of the

Justice Department, conducted another extensive investigation. The report was transmitted to the Department of Justice in June, 1972, more than two years before the commencement of grand jury proceedings. The primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U. S. Attorney). This latter two years is the most offending delay and certainly weighs heavily against the government in determining whether MacDonald's right to a speedy trial has been violated.

The Defendant's Assertion of His Right

There is no question but that MacDonald vigorously pursued his right to a speedy disposition of the charges against him. He gave statements to the CID while still in the military and testified under cross-examination at the military hearing. He waived immunity and testified before the grand jury when it was finally convened, and consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case. This is entitled to strong evidentiary weight in determining whether he has been deprived of his right to a speedy trial. *Barker, supra*, 407 U.S. at 532.

Prejudice—The Fourth Barker *Factor*

The question of prejudice is, of course, viewed from a crucially different perspective after the trial of the case than was available prior to trial. Completed evidence presents a detailed picture from which the possibilities of prejudice can be gauged. "As is reflected in the decisions of this Court, most speedy

trial claims, therefore, are best considered only after the relevant facts have been developed at trial . . . . Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. . . ." *U. S.* v. *MacDonald*, 435 U.S. 850, 858 (1978).

It is a rare case, however, where testimony will simplistically demonstrate that the defense has been hampered by the passage of time. The MacDonald prosecution and defense is no exception. The evidence at trial, if anything, confused rather than clarified the question of actual prejudice at trial. As a reviewing court, our task has been to carefully sift the record and balance the evidenced effects of delay with the other "speedy trial" rules of *Barker* and its progeny.

It has been urged that *MacDonald, First* misconceived the significance of certain physical evidence obtained at the murder scene: a flower pot, MacDonald's pajama top and a coffee table. It is further insisted that, judging by what actually occurred at trial, and not by what was anticipated would occur at trial, those items were not utilized by the government in a manner unfairly prejudicial to MacDonald when the case was presented to the jury. However, those particular items were alluded to as "but examples of the many questions about physical evidence that the government's case turns on." 531 F.2d at 208. The particular differences between pre-trial expectations and the actualities of trial are insignificant in the total picture.

The government has contended that pre-trial concerns about the prejudice to MacDonald from the fading memories of witnesses and the necessity for them to rely on statements made half a decade pre-

viously have proved groundless in the actual event. The prosecutor, the contention runs, did not need to refresh recollections at trial by resort to the earlier-obtained witness statements. However, that is no adequate response. The risk to MacDonald was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case by reminding each witness of what he had said at the outset. The intervening period of over nine years rendered it virtually impossible for MacDonald to prove the recollections of each witness to see if they were fuller than or different from what he had stated when his statement was taken.[2] Such refurbishing and improvement of recollections are, it is true, *possible* even after the lapse of over nine years from the commission of the crimes to the trial of MacDonald. Some government witnesses did change their original stories.[3] Yet, in general, the likelihood is greatly dimin-

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[2] Not all of the nine year delay was attributable to the government, but all of it contributed to the fading of memories. Excluding the period until June 1972 when the CID investigation report reached the Justice Department, and the time following the January 1975 indictment, which MacDonald acknowledges did not constitute inexcusable delay (*see* 531 F.2d at 202), there were still more than two years in which essentially all that the government did was debate, in a desultory way, whether to press for prosecution or to drop the case. That delay was unreasonable and inexcusable. It contributed to the dissipation of recollections. That consideration suffices to engage the speedy trial protection of the Sixth Amendment.

[3] MacDonald has contended that those changes to his detriment were also prejudicial occurrences attributable to the undue passage of time resulting from the government's delay. We need not explore the substantiality of that contention.

ished. The substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place. *Cf. Moore* v. *Arizona*, 414 U.S. 25 (1973) (per curiam).[4]

In this regard, the loss of the testimony of Helena Stoeckley has been cited by MacDonald as the greatest prejudice to him occasioned by the undue passage of time. In a bizarre way, she had made remarks to others on several occasions in 1970, 1971 and 1979, which, while far from precise or complete, indicated that she was one of a group of intruders whose supposed entry into the MacDonald home and killing of his wife and children constituted the essential defense offered by MacDonald.

We do not agree that this was the greatest prejudice to the defense. Nevertheless, Stoeckley's statement on the stand at trial that she had no recollection of her whereabouts or activities during the critical period of midnight to 4:30 A. M. on the night of the crimes (although she remembered in detail events immediately prior and immediately subsequent to that crucial interval) had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre. The likelihood that Stoeckley would testify that she could not remember was inevitably increased by the passage of the period of inexcusable delay. The consquences of having put on a witness who was to have verified MacDonald's own version of a Manson-like intrusion, only to have her fail to do so, may well

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[4] In *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972), Justice Powell identified as an interest of the defendant bearing on the existence of prejudice: "the possibility that the defense will be impaired."

have been disastrous to the defense. The potential for the drawing of adverse inferences by the jury is palpable. Yet the difficulty may not be dismissed as one of the inescapable risks associated with any tactical decision taken at trial. If Stoeckley could have remembered and testified to the critical 4½ hours, her remarks to others created a substantial enough basis that one cannot fault the decision to put her on the stand. MacDonald was entitled to that tactical course without its efficacy's having been vitiated by inexcusable action of the government. Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great. The possible reasons why Stoeckley did not so testify are several.[5] But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential—indeed a probable—cause of that memory lapse.

The consideration that Stoeckley had theretofore demonstrated a great unreliability would not render omission of such testimony harmless error, for it would have only created an issue of credibility for the jury on the central question of fact which it was called upon to resolve.[6] The present case did not

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[5] A likely one is that she was not on the scene of the crimes at all. However, that possibility did not erase the potential prejudice to MacDonald, for it was only a possibility. It was also quite possible that she was present, and could have given evidence supportive of MacDonald's thesis that intruders killed his wife and daughters.

[6] Efforts of MacDonald to supply the deficiency of Stoeckley's memory by introducing hearsay testimony from those she had told stories which placed her on the scene on the

present the situation of a witness who would of necessity have to have committed perjury, if allowed to testify, as would be the case with someone shown to have been in prison at the very time the events occurred about which he was to testify. Exclusion of testimony from such a source obviously would be proper. However, the possibility that Stoeckley was physically present at the scene was not ruled out. Questions as to reliability of her testimony went only to the weight—a matter for the jury—not to the imposibility of her having experienced what she was proferred to testify about—a matter for the court.

Nor does it suffice for the government to point out that the denial of Stoeckley's testimony to MacDonald *may* not have been attributable to the government's delay. The governmnt makes reference to testimony from one of those to whom Stoeckley told a story seeming to implicate her that, within a week of the crimes, she was stating that her memory was essentially blank as to the crucial hours. Her memory has resembled a lightbulb not screwed tight, blinking on and off. Still, however much other possible explanations for her memory loss can be asserted, the unavoidable principle remains that passage of time generally tends to erase memory. While other factors may have contributed, the possibility, indeed the

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night of the crimes were thwarted by government objections sustained by the district judge on the basis of Fed. Rules of Evid. 403, 804(b)(3). We have no occasion to question the correctness of the judge's evidentiary rulings. With hindsight, however, the government prosecutors may rue having prevented curative action for one potentially devastating prejudicial consequence of the government's unwarranted delay and concomitant failure to move ahead in a fashion to insure to MacDonald a speedy trial.

probability, that unreasonable delay was the cause cannot be excluded.

Although, in this important aspect, prejudice, the fourth *Barker* factor, we approach MacDonald's Sixth Amendment allegation from a different background than that available to this Court in *MacDonald, First, supra*, we are still of the opinion that viewed in the light of all the evidence developed at trial, there was substantial possibility that MacDonald's defense was prejudiced by the delay.

As stated, we need not base our conclusion of prejudice solely or principally on the failure of Stoeckley. A pertinent comment of Justice Powell in the *Barker* opinion is relevant to the testimony of each witness whose testimony was based on his investigation of the case more than five years before the trial: "Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at 532. *MacDonald, First* rested substantially on this general principle—of almost certain memory erosion in the cases of all witnesses where the case has the characteristics of this one. Facts adduced at trial did little to dispel this judgment.

The possibility of prejudice to the defense at trial, although important, is only one element of the prejudice that may be shown to sustain a Sixth Amendment attack. As Justice White stated in his concurring opinion in *Barker*:

> Only if such special considerations [those considerations presenting a pressing public need] are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at

> trial. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States* v. *Marion*, *supra*, at 320.

Barker, *supra*, 407 U.S. at 537-38. It is significant that the full Court later quoted with approval Justice White's language preceding the above quotation:

> Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings. Inordinate delay,
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> > "wholly aside from possible prejudice to a defense on the merits may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.' *United States* v. *Marion*, 404 U.S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty." *Barker* v. *Wingo*, *supra*, at 537 (White, J., concurring.)

Moore v. *Arizona*, 414 U.S. 25 (1973) (per curiam). *See also Strunk, aka Wagner* v. *United States*, 412 U.S. 434, 439 (1973) ("The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial . . . .").

It is also important to remember Justice Powell's admonition that the four *Barker* factors have "no talismanic qualities; courts must still engage in difficult and sensitive balancing process." *Barker, supra*, 407 U.S. at 533.

The sensitive process of balancing is a task highly individualized by the circumstances of each prosecution. The amount of demonstrable trial prejudice which would be violative of MacDonald's right to a speedy trial is affected by his persevering five-year insistence that his case be resolved and by his open and aggressive participation in the investigatory process. Weighing heavily in the equation is the government's calloused and lackadaisical attitude which was solely responsible for at least the last two years of delay. To require a showing approximating actual prejudice would have the adverse effect of encouraging such irresponsible administration of criminal justice. Also included in this equation is the personal prejudice to the accused. Not only was he under a cloud of suspicion for five years prior to the trial, but the personal pressure and anxiety of a threatened prosecution for murder is demonstrated by the expense and concern he expended in attempting to have the charges resolved.

The prosecution consisted solely of highly technical circumstantial evidence. The government had the great advantage of unlimited financial and personal resources, access to laboratory and other technical devices, presenting evidence by skilled technical witnesses upon whom the jury must principally rely.[7]

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[7] In one sense such technical circumstantial evidence is easier to preserve during a delay, but in another sense, after five years it is easier to orchestrate an array of technical evidence. The technical witnesses frequently are relying on

The required judicial balancing process necessary to determine a violation of the Sixth Amendment, speedy trial requirements has been particularly difficult. It is made more difficult by the terrible crime and by the fact that a jury has found MacDonald guilty after a protracted trial. The vital balancing, however, tips the scales decisively in favor of finding a violation by the government of MacDonald's Sixth Amendment rights. We cannot and do not assess the correctness of the jury's verdict, and regardless of that we certainly cannot let such considerations condone or establish a prosecutorial method of obtaining convictions in violation of the fundamental constitutional right of future generations.

Under the Sixth Amendment, a showing of unreasonable delay, plus substantial proof of prejudice, mandates a holding that the constitutionally guaranteed speedy trial has been denied. *Barker* v. *Wingo*, 407 U.S. 514 (1972). For Fifth Amendment purposes there must be a determination that the prejudice was so extreme as to amount to violation of "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency,'" *United States* v. *Lovasco*, 431 U.S. at 790. Under the Fifth Amendment, proof of prejudice is generally a necessary, but it may not be a sufficient element of a due process claim. The test,

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scientific speculation and trial and error. An example important to his case is the testimony concerning the way in which a pajama top was folded over the deceased wife. The testimony was deduced years after the crime by matching numerous ice pick holes in the garment. This testimony was calculated to demonstrate that this stabbing was arranged after her death in order to simulate an intruder's attack.

as to prejudice, for Sixth Amendment purposes is not so stringent. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972). The fact that the delay was undue and resulted in prejudice suffices in MacDonald's case, whether or not the delay and consequent prejudice were so egregious as to amount to deviation from "fundamental conceptions of justice." The extensive discussion in *Lovasco* of how extreme was the prejudice suffered by the accused by reason of the delay, therefore, has little pertinence to the Sixth Amendment claim of MacDonald that he was not accorded a speedy trial.

We, therefore, remand the case to the district court with directions to set aside its judgment, vacate the sentences, and dismiss the indictment.[8]

Reversed and Remanded.

ALBERT V. BRYAN, SR., dissenting:

Murder of his pregnant wife and his 6 and 3-year old daughters, with a blunt instrument, a knife and an ice pick, between midnight and dawn on February 17, 1970, in their home at Fort Bragg, North Carolina, was charged to Jeffrey MacDonald by a Federal indictment. His guilt and sanity were established to the satisfaction of the trial jury beyond a reasonable doubt. Nevertheless, this court absolves him forever of his hideous offense, shockingly laying his release exclusively on the failure of the Government to prosecute within a shorter time than it did. The majority's resolution is achieved through utiliza-

[8] *Strunk, aka Wagner* v. *United States*, 412 U.S. 434, 440 (1973).

tion of the Sixth Amendment's exaction that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." [1] This implementation of the constitutional clause was held untenable by the District Judge, and I agree.

The opinion of the majority here alludes to *Barker* v. *Wingo*, 407 U.S. 514 (1972), a decision that gives guidance in the application of this clause. In *Barker*, the Supreme Court charted a balancing test, identifying four factors the courts should consider in ascertaining whether the right to a speedy trial has been denied: the length of the delay; the reason for the delay; the defendant's assertion of the right; and prejudice to the defendant resulting from the delay. *Id.* at 530. The Court emphasized, however, that "[a] balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. [The Court] can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." *Id.* Keeping in mind the Court's repeated admonition that none of the four points mentioned is determinative but, rather, that "they are related factors and must be considered together with such other circumstances as may be relevant," *id.* at 533, the appellant's speedy trial premise should be rejected.

With regard to the first factor, the length of the delay, the appellant calls attention to the lapse of five years between the date of the crime, February 17, 1970, and the return of the indictment, January 24, 1975.[2] Baldly stated, the count of five years con-

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[1] Incidentally, Congress has declared that there shall be no limitation of time on a prosecution for murder. 18 U.S.C. § 3281.

[2] It is conceded that the Government is not responsible for any significant delay occurring since then.

jures up serious prosecutorial dawdling, but in the light of the record this appearance vanishes.

Immediately upon word of the crimes, the Army's Criminal Investigation Division (CID) took the primary role in the investigation. Not until May 1, 1970, however, did the Army charge MacDonald with the murders. On October 23, 1970, the commanding general of MacDonald's unit at Fort Bragg dismissed the case after reviewing the investigating officer's report which concluded that the charges were "not true."

Nevertheless, upon the request of the Department of Justice, the CID still pursued the inquiry in an "extensive and wide ranging" discovery effort. In June, 1972, it submitted to the Department a 13-volume report; supplements thereto were transmitted in November, 1972, and August, 1973, at the Department's request. These reports reflected the sweeping breadth of the investigation, which embraced almost 700 interviews and numerous scientific tests. A number of Government attorneys having reviewed and evaluated the reports, a grand jury was impanelled in August, 1974—only one year after the filing of the CID's final investigative report—to consider the MacDonald family murders.

While the grand jury was taking evidence, the Federal Bureau of Investigation continued the probe. Its exploration led to the exhumation of the bodies of the three victims; the object was to obtain samples of their hair, in order to compare them with strands found on pieces of evidence in the MacDonald home. Obviously, neither the grand jurors nor the Government were idle between the calling of the jury in August, 1974, and the return of the indictment in January, 1975.

The crucial period of delay attributable to the Government, then, is, at most, the period of slightly more than two years between the CID's submission of its initial, major report in June, 1972, and the convening of the grand jury in August, 1974. Even assuming that the case could have been put before a grand jury at an earlier date, the fact that some substantial delay occurred only touches off inquiry into the other relevant factors and does not itself establish a constitutional deviation. *Barker* v. *Wingo*, 407 U.S. at 530.

Passing to the second factor isolated in *Barker*—the justification the Government offers for its delay—contrary to the majority's condemnation of the Government, to me the deferment of grand jury submission was well advised, both in public concern and in fairness to MacDonald. Certainly, the Department of Justice was wise to await a mature completion of the CID's inquisition, taking advantage of the comprehensiveness and expertness of its scrutiny and evaluation of the evidence.

Fairness to MacDonald, too, dictated postponement of the calling of a grand jury. Historically, the grand jury has been, and presently still stands as, an institution interposing a bulwark for the protection of the individual citizen as well as of the public. Because an indictment is a solemn charge, whether followed by a verdict of guilty or an acquittal, the deliberations and returns of a grand jury should never be regarded as mere formalities. Notwithstanding that, after acquittal, the indictment is theoretically without force or effect, as a practical matter, it brands the subject as a criminal suspect for the rest of his life; it will be recalled whenever his name is mentioned, especially when the offense charged is

particularly grave or shocking. In addition to the personal anxiety and humiliation anyone so accused endures, the practical consequences of this stigma to a banker, lawyer, physician, or any person holding a position of responsibility may be devastating. It follows as a matter of fairness that no one should be exposed to this future shadow until the Government has gleaned all available evidence.

Appellant contends, and the majority agrees, that the justifications the Government offers for its delay in seeking the indictment are wholly unacceptable. Insofar as the Government may cite internal bureaucracy as a source of postponement, some disapproval may be warranted. Nevertheless, the quantity of evidence amassed, and the time required to assess it, must be taken into account. The 1972 report, it will be remembered, comprised not less than 13 volumes; these had to be closely read and digested, not given just a sketchy oversight. Finally, it should be kept in mind throughout, any failure of the Government's explanation completely to justify the entire period of delay is not decisive; it is merely a factor to be considered in the balance.

As to the third consideration enumerated in *Barker*, it is indisputable that MacDonald attempted to assert his right to a speedy trial. During the years involved, he manifested an eagerness to have the matter resolved and apparently did nothing to impede the progress of the prosecution.

The fourth factor to which *Barker* directs attention is prejudice to the defendant. There and in *Moore* v. *Arizona*, 414 U.S. 25 (1973) (per curiam), the Court "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a

speedy trial." *Id.* at 26. The majority here relies on that precept in averring that the delay in MacDonald's indictment gave rise to "the substantial possibility of prejudice," and in deeming that possibility a sufficient basis for concluding that his right to a speedy trial had been denied.

Admittedly, MacDonald need not affirmatively prove actual prejudice as a single, essential prerequisite to his claim under the Sixth Amendment; nonetheless, we must turn to the record and to the surrounding circumstances to ascertain the extent, if any, to which MacDonald's defense was impaired directly as a consequence of the delay in prosecution.[3] Although the focus is on the *possibility* of prejudice,

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[3] Prejudice is to be considered in the light of the purposes of the speedy trial right: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker* v. *Wingo*, 407 U.S. at 532. The first concern is not raised in this case because MacDonald was subject to some form of restraint for only the brief period between April and October, 1970, and that by the Army. Moreover, acknowledging that prejudice, in the form of personal adversity unrelated to the merits of the defense, will be "inevitably present in every case to some extent," *id.* at 537 (White, J., concurring), *quoted in Moore* v. *Arizona*, 414 U.S. at 27, it may be presumed that MacDonald suffered anxiety and concern as a result of the delay in prosecution. Nevertheless, the record reveals that he was able to proceed with his life, reestablishing himself professionally and developing new friendships. Because the postponement of his indictment does not appear to the District Judge or to me to have impaired, directly or inordinately, MacDonald's personal life during the period at issue, this form of prejudice is not a crucial factor in this case. Therefore, the analysis will focus on the third concern, prejudice to MacDonald's defense on the merits.

we must not ignore what *actually* transpired.[4] In this, I join the District Judge's finding, in his post-trial order refusing bail pending appeal, that "[t]he fears . . . that the defendant's ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay *have not been borne out* in the record developed at trial." *United States* v. *MacDonald*, No. 75-26-Cr-3 (E.D.N.C. Order of Sept. 14, 1979) (accent added).

Both in brief and in oral argument, appellant put forward a number of instances in which, he complains, his defense suffered as a result of the delay in his trial. A reading of the record reveals, however, that MacDonald's ability to defend himself was not significantly impaired, either in the particular ways he names or in any other manner apparent in the record.

Among the impediments to his defense MacDonald urges is deterioration of certain physical evidence between the time of the murders and the trial date. He calls attention to his pajama top, asserting that characteristics of the multiple puncture holes found in it—characteristics that might have enabled

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[4] The opinion of the Supreme Court holding that this prosecution could not be dismissed on speedy trial grounds prior to trial on the merits, *United States* v. *MacDonald*, 435 U.S. 850 (1978), *rev'g* 531 F.2d 196 (4th Cir. 1976), supports this approach. The Court noted that "[t]he resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case" after those facts have been established at trial. *Id.* at 858. The Court added: "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative." *Id.* One of the advantages of reviewing such a motion after a decision on the merits has been rendered, therefore, is that, for the most part, speculation can be avoided.

him to contradict the prosecution's damaging inferences—had vanished with time. Advertence to the record disclosures, however, that the loss of these characteristics (the visible differences between "entry holes" and "exit holes") took place rapidly and may not be attributed specifically to the two-year delay imputed to the Government; indeed, it is admitted that even in 1971 few of the holes in the garment could be identified as entry or exit holes. Another of MacDonald's aggrievements centers on the deterioration of a bloody footprint, which he was no longer able to distinguish adequately at trial. He had not contested the print as his, however, and he fails to show the import of that line of inquiry. Other contentions of changes in the physical evidence likewise do not demonstrate convincingly that the defendant's situation was significantly weakened by the delay in indictment.

The next ground for MacDonald's insistence as to prejudice is the effect of the delay on the testimony of witnesses. Foremost in this argument is the impact of the postponement on the testimony of Helena Stoekley. MacDonald contends that delay effectively robbed him of the benefit of her testimony because, in the intervening period, she had lost memory of her activities, her whereabouts, and her companions on the night of the murders, and of certain inculpatory remarks she subsequently had made.

The majority agrees with appellant that Stoekley's statement at trial that she could not recall her activities in the critical hours "had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre." *Supra*, at ———. Nothing in the record, how-

ever, warrants the assumption that Stoekley would have or could have given the testimony the majority would ascribe to her had the Government secured its indictment earlier.

Stoekley herself in her trial testimony explains that her inability to recall the pre-dawn events of February 17, 1970, resulted from her consumption, earlier in the evening, of large quantities of drugs; she in no way indicated that *time* had weakened her recollection. The evidence given by a neighbor of Stoekley's at the Army hearings in 1970 narrates that, within a week or two of the murders, Stoekley told him that she could not remember where she had been on the night of the crime. Similarly, the record reveals that the statements concerning the murders, which she reputedly made to various persons in the months and years preceding MacDonald's trial, are vague, fragmented and contradictory; they do not indicate simply a gradually fading memory, eroded by time.[5] Unmaintainable on the record is the major-

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[5] The District Judge noted, with regard to Stoekley's testimony at trial:

> Stoekley was put on the stand by defense counsel and questioned at considerable length about her knowledge of the MacDonald murders. The substance of her testimony was that she was not involved in the murders but that because of her drug-crazed condition she had at least come to wonder whether or not she was in fact involved, and she admitted to owning . . . clothing [similar to that ascribed by MacDonald to one of the alleged intruders] . . . and to the fact that she seemed to go into mourning following the murders. The Court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced

ity's position that it was "reasonable to expect [Stoekley] might have testified" that she witnessed the murders and that "[t]he Government's inexcusable delay of over two years' duration cannot be eliminated as a potential—indeed a probable—cause of [her] memory lapse." *Supra* at ——. Instead, the record fully upholds the Government's contention that any culpable delay on its part had no discernible effect on Stoekley's testimony. Furthermore, none of the other instances of prejudice he lists tends to prove that MacDonald's ability to defend himself was impaired significantly by the deferred indictment.

Finally, in this case, viewed in its entirety, the absence of substantial prejudice and the reasonable assessment of the other factors to which *Barker* draws attention do not sustain the accusation that the Government disregarded its constitutional duty to bring MacDonald promptly to trial or trampled on the aims of the Sixth Amendment.

Affirmance of the judgment now on appeal is demanded by the record.

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mental distortion and that she could be of no help to either side in the case.

United States v. MacDonald, No. 75-26-Cr-3 (E.D.N.C. Order of Sept. 14, 1979). Totally apart from the question of the trustworthiness or untrustworthiness of Stoekley's testimony, her remarks on the stand do not reflect a diminishing recollection of the events of nine years before, but rather a preexisting gap in her ability to recount those events. This gap cannot reasonably be attributed to the prosecution's failure to secure an indictment earlier.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5253

75-26-CR3

UNITED STATES OF AMERICA, APPELLEE

v.

JEFFREY R. MACDONALD, APPELLANT

Appeal from the United States District Court
for the Eastern District of North Carolina.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the U. S. District Court for the Eastern District of North Carolina, at Raleigh, with directions to set aside its judgment, vacate the sentences, and dismiss the indictment, consistent with the opinion of this Court filed herewith.

Filed Jul. 29, 1980

/s/ William K. Slate, II
Clerk

A True Copy, Teste:

William K. Slate, II, Clerk
By Julian S. Coyne

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5253

UNITED STATES OF AMERICA, APPELLEE

vs.

JEFFREY R. MACDONALD, APPELLANT

On Request for Rehearing En Banc

Submitted: August 18, 1980

Decided: December 18, 1980

PER CURIAM:

The petition for rehearing is denied, Judge Bryan dissenting. A majority of the judges of the Court who are in regular active service has not voted in favor of rehearing en banc, and the request therefor is accordingly denied.

Annexed hereto are:

(1) Dissenting statement of Chief Judge Haynsworth.

(2) Dissent of Judge Russell, Judge Widener, Judge Hall and Judge Phillips.

(3) Statement of Judge Murnaghan.

HAYNSWORTH, Chief Judge, dissenting:

Ordinarily, I think it inappropriate for judges to write in support of losing votes for an *en banc* rehearing. The situation presented here, however, is not ordinary, for the question which five of the ten judges in regular active service sought to have the

en banc court consider has never been addressed in any of the panel opinions. In this very extraordinary case, I think the parties and the public are entitled to know the question which five of the judges sought to have argued before, and determined by, the full court.

Of course, preindictment delay may be relevant to a Fifth Amendment claim of deprivation of due process. That is true whether or not there had been an earlier indictment or arrest which had been terminated by dismissal or release. The relevance of such an interval between two separate proceedings to a Sixth Amendment claim of denial of a speedy trial, however, has never been adjudicated by this court. I would prefer not to express what may appear to be a considered opinion of it without plenary consideration of it by the full court, but denial of the rehearing forecloses that possibility. My tentative agreement with the position of the United States in its petition for rehearing was sufficiently firm, however, to prompt me to request a poll of the court on the suggestion of rehearing *en banc* and to vote for it.

Under these circumstances, it seems to me appropriate for Judges Russell, Widener, Hall and Phillips to give expression to their views and for me to file this tentative addendum in agreement with them that the interval between Dr. MacDonald's release by the Army and his later indictment is irrelevant to a consideration of his Sixth Amendment claim.

JUDGES RUSSELL, WIDENER, HALL, and PHILLIPS, dissenting.

We dissent from the denial of *en banc* rehearing in this case. We do so primarily because the denial results in a complete failure by this Court to address a point raised by the Government in its petition for

rehearing, which we regard as completely dispositive against any claim by the defendant under the Sixth Amendment.[1] The point raised is that, in assessing the length of delay under a Sixth Amendment claim, it is not appropriate to take into account periods between successive indictments during which a defendant was under no accusation.

Barker v. *Wingo*, 407 U.S. 514, 530 (1972), declares that the first question to be addressed in resolving every Sixth Amendment speedy trial claim, which is the claim on which the panel opinion reverses, is the determination of the "length of delay" in the prosecution. Unless such delay is sufficiently lengthy to be assessed as "presumptively prejudicial," [2] the claim of constitutional violation must fail and it is unnecessary for the Court to consider any of the other factors listed in *Barker*. *Id.* at 530. It is thus clear that it is crucially important to identify both the beginning and the ending date for computing "length of delay" in the prosecution, as that term is used in *Barker*, and as further defined in *United States* v. *Dillingham*, 423 U.S. 64 (1975). The first opinion in this case [3] fixed both critical dates. The Court in that opinion found that the relevant period for computing "length of delay" was the period of "delay between the accusation and detention of MacDonald [under the military proceedings and his in-

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[1] We do not address any claim for relief by the defendant under the Fifth Amendment because *the panel opinion very clearly declares at the outset that it does "not reach . . . the . . . the Fifth Amendment issue."* If an issue under the Fifth Amendment is to be considered, it can only be done by granting the Government's motion for rehearing.

[2] *Barker* v. *Wingo*, 407 U.S. at 530.

[3] *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976) [hereinafter refered to as *"MacDonald I"*].

dictment in this proceeding, which] was more than four and one-half years." 531 F.2d at 205. It fixed the beginning date as May 1, 1970, when the Article 32 military proceedings were begun against MacDonald. These proceedings the court considered to be the equivalent of a civilian arrest.[4] It identified the termination of the critical period as the return of the indictments. It did this because the defendant conceded that there was no "substantial delay" after indictment. Since the defendant was himself responsible for any real delay after indictment, he could not have avoided making such concession.[5] The court

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[4] The defendant MacDonald was charged in an affidavit, filed under Article 30 of the Uniform Code of Military Justice, 10 U.S.C. § 830, with the murder of his wife and children. On the basis of that charge, the defendant was "restricted to quarters" and "relieved of duty" and an Article 32, 10 U.S.C. § 832, hearing was set to determine whether probable cause existed for sending the matter up for a court martial. At the conclusion of the Article 32 hearing, it was recommended that the charges be dismissed and that recommendation was accepted and adopted by the commanding general, with the result that as of October 23, 1970, the military charges against the defendant were dismissed. Subsequently, in December, 1970, the defendant requested and received an honorable discharge from the Army. He then established himself in California, where, between 1971 and his indictment in 1975, he was actively engaged in the practice of medicine.

[5] *Hill* v. *Wainwright*, 617 F.2d 375 (5th Cir. 1980) ("If the postponement is occasioned by the actions of the accused himself, the delay . . . may be excused." *Id.* at 378); *Keeny* v. *Swenson*, 458 F.2d 680, 682 (8th Cir.), *cert. denied*, 409 U.S. 1027 (1972); *United States* v. *Cook*, 400 F.2d 877, 878 (4th Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1100 (1969); *Morland* v. *United States*, 193 F.2d 297, 298 (10th Cir. 1952); *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F.2d 338 (9th Cir. 1951).

in *MacDonald I* proceeded to find that this delay of four and one-half years was sufficient to justify, under the *Barker* "triggering" test, "inquiry into the other factors that go into . . . assessing MacDonald's claim that he has been denied a speedy trial." *Id.* at 205. The present panel opinion adopts this conclusion of *MacDonald I*.[6]

Our point of difference with the present panel opinion, as well as with *MacDonald I*, is the inclusion in the computation of "length of delay" the period between the dismissal of MacDonald's military arrest in October, 1970 and January, 1975, when he was indicted. This was a period during which he was not under arrest, was not under indictment or any other form of legal accusation, civil or military. There was no charge pending against him, and thus there was neither a trial nor even a hearing which he could request or demand. In short, there was nothing to which a claim for a speedy trial could attach. From December, 1971 to January, 1975, he

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[6] There is some confusion in the panel opinion on this point. Immediately after declaring that it adopts the conclusion and reasoning of the Court in *MacDonald I* on "length of delay," which under *MacDonald I* was calculated from the date of the military arrest to the date of the indictment, the present panel opinion states in the very next sentence that the "length of delay" in this case, under the *Barker* rule, was "the lapse of time between the military arrest and trial." By this statement, it would double the time period found in *MacDonald I* to be the proper computation of "length of delay" for purposes of resolving the "triggering" factor under *Barker*. In so doing, it overlooks entirely the reasons which prompted Judge Butzner in *MacDonald I* to terminate the calculation of delay with the return of the indictment, *i.e.*, that the defendant himself, by his various motions and appeals had been the author of any substantial delay that followed the indictment.

was practicing his profession without hindrance of any kind. If this period of time is eliminated from the period of delay found by the panel and by *MacDonald I*, the delay will be at most seven months, a period entirely too short to "trigger" further inquiry under *Barker*. See *United States* v. *McGrath*, 622 F.2d 36, 40-41 (2d Cir. 1980).

That this period beween 1970 and 1975 when the defendant was free of any legal accusation of any kind is not to be counted in computing "length of time" is clearly established in the opinion of Judge McCree in *United States* v. *Martin*, 543 F.2d 577, (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977); in fact, it can be argued that the entire period of time between the filing of the first indictment and its dismissal was thought by the Court in that case to be outside the period to be considered in evaluating delay in connection with the second indictment. The opinion of Judge McCree in that case is directly on point. In *Martin*, the defendant was charged under an indictment returned in August, 1972. Those charges were dismissed in January, 1973.[7] A second indictment was filed in December, 1974 and the defendant was tried and convicted in December, 1975. He contended both at trial and on appeal that the delay from his first indictment to his trial in De-

[7] There is a difference between this case and *Martin*. In this case, the first proceeding never got to the indictment stage. It was dismissed at the preliminary hearing stage, if we analogize the military procedure to civilian criminal procedure. In the *Martin* case, the dismissal was after indictment. But as a practical matter, the earlier proceedings in both cases were effectively terminated by a dismissal, in the one case of the military charges and in the other of the indictment, and so the legal consequences of the two dismissals are the same.

cember, 1975 violated his speedy trial rights under the Sixth Amendment. In dismissing the contention and in holding that the period between the dismissal of the first indictment and the return of the second, if not the entire period between the first and second indictments, was to be disregarded in calculating "length of delay" under *Barker*, Judge McCree said:

> The Sixth Amendment right to a speedy trial does not attach until the formal charge, *the trial of which is alleged to have been inordinately and prejudicially delayed, is made. United States* v. *Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time. The remaining time is not remotely comparable to the five year delay which provoked the analysis in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Even if we were to include the five months between the filing and dismissal of the earlier charges in this case, the total period of delay would still be less than the time between Barker's first objection to delay and Barker's trial. Even that period was insufficient to show a violation of Barker's Sixth Amendment rights. *Id.* at 579. (Emphasis added.)

Moreover, Congress, in enacting the Speedy Trial Act of 1974, 18 U.S.C. § 3161, *et seq.*, has in essence given legislative imprimatur to the rule announced by Judge McCree in *Martin*, at least its exclusion of the period of time between the dismissal of an earlier indictment and the return of a second indictment. Thus, that Act provides that the period be-

tween the dismissal of an earlier indictment and the return of a second indictment for the same offense "shall be excluded * * * in computing the time within which the trial of any such offense must commence" under the Act. 18 U.S.C. § 3161(h). And this is true whether the Government or the defendant has sought dismissal of the earlier indictment. The only distinction which the Court makes between the situation where the Government makes the motion and where the defendant makes the motion, is that the time between the return of the first indictment and its dismissal is included in computing the delay if the dismissal is at the instance of the Government but not if the dismissal is on the motion of the defendant. *But, in both situations, we repeat, the period between dismissal of the first indictment and the return of the second is not counted. See United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980).[8]

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[8] *See* the Annotator's Note in 18 U.S.C.S. § 3161, at p. 371:

Policy and Purpose of Speedy Trial Act of 1974, 18 U.S.C.S. § 3161 *et seq.*, and of all speedy trial plans have been to expedite processing of *pending* criminal proceedings, not to supervise exercise by prosecutor of his investigative or prosecutorial discretion at time when no criminal proceeding is pending before court; to invade judicial branches in matters that fall primarily, if not exclusively, within jurisdiction of executive branch; by same token, neither Act nor Plans were intended to impose time limits in addition to those provided for by Constitution with respect to government investigations undertaken while defendant is not subject of formal proceedings; taken together, 18 U.S.C.S. §§ 3161(d) and (h)(6) make it clear that Congress' purpose was to disregard period after dismissal of complaint and prior to filing of indictment for same offense; although § 3161(h)(6), read literally, suspends running of Act's time limits upon Government's dismissal of indictment, as

Despite the clarity of Judge McCree's opinion in *Martin* and, in effect, the adoption of this view by the Congress itself in its legislatively mandated Speedy Trial Act, the panel opinion has included in its calculation of "length of delay" the period between 1970 and 1975, after the dismissal of the military Article 32 proceedings when the defendant was not "accused." [9] In *Mac Donald I*, the court sought to justify such inclusion by this reasoning:

> MacDonald's freedom from detention on bail during the interval between the termination of the Article 32 proceeding and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceed-

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distinguished from complaint, it follows that upon voluntary dismissal of complaint period thereafter up to filing of indictment should not be included, if not disregarded entirely pursuant to § 3161(d). *United States* v. *Hillegas* (1978) 578 F.2d 453.

This conclusion follows the authoritative language of S.Rep. No. 93-1021, at 33, Report in the Senate Judiciary Committee on the Speedy Trial Act, July 18, 1974:

> "Thus, when subsequent complaints are brought, the time limits will begin to run from the date of the filing of the subsequent complaint."

[9] It would seem that, since the dismissal of the military proceedings must be taken as at the defendant's motion, the entire time prior to the second indictment should be eliminated from the computation of "length of delay." It does not matter here, though, whether or not we include this period between arrest and dismissal of the military proceedings. Whether included or not, the "length of time" here, just as in *Martin*, would not be enough to meet the "triggering" test under *Barker*.

> ings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense. He remained under suspension and was subject to the anxiety of the threat of another prosecution.[10]

531 F.2d at 204. In the present panel opinion, the court finds the same factors to constitute "personal prejudice to the accused [sic]."

The circumstances advanced by the two opinions for refusing to exclude the period when no criminal proceedings of any kind were pending before the court and the defendant was not subject to any legal restraint or accusation will not support a Sixth Amendment speedy trial claim, for the simple reason

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[10] Neither ground stated by the court would justify even a due process claim under the Fifth Amendment. The courts have uniformly dismissed general statements of anxiety as insufficient to support any claim of prejudice. As the court said in *United States* v. *Shepherd*, 511 F.2d 119, 123 (5th Cir. 1975), ". . . anxiety is present to some degree in every case. Something more than the ordinary anxiety that accompanies a trial is necessary to show a degree of prejudice." See also, *United States* v. *Avalos*, 541 F.2d 1100, 1115 (5th Cir. 1976).

The defendant may have continued the representation he had in the military proceedings after the case was referred to the Department of Justice. But such expense as this entailed was directed at inducing the Department not to prosecute. This is hardly a ground in speedy trial cases. In every extended criminal investigation, the one who considers himself as the object of the investigation generally has employed counsel. We doubt that the courts are prepared to consider this expense as prejudice, certainly not prejudice sufficient to justify freeing one whose guilt was later established by the unanimous verdict of a jury after an error-free trial.

that there was no charge against the defendant to be tried during this time. What the two opinions overlook is that the defendant has a remedy if any delay prior to indictment created sufficient prejudice that it can be fairly said that the defendant's right to a fair trial has been impaired. But—we repeat—this remedy is not found under the Sixth Amendment speedy trial clause but under the Fifth Amendment due process clause. This fact was made abundantly clear in *Arnold* v. *McCarthy* 566 F.2d 1377, at 1383 (9th Cir. 1978). There, the court said:

> When the mistrial was declared on November 4, 1969, after the jury failed to reach a verdict in Aronld's first trial for robbery assault, the prosecution moved to dismiss the charges. The dismissal was granted without prejudice. After the dismissal Arnold was no longer "accused"; he no longer had any right to demand a speedy trial under the Sixth Amendment. Any contention that he was prejudiced by delay between this dismissal and his second trial must be tested under the general requirements of due process.[11]

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[11] See also *United States* v. *Beckham*, 505 F.2d 1316, 1319 (5th Cir. 1975), and *United States* v. *Davis*, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).

The Senate Committee Report, *supra*, p. 7, n.5, suggests this same remedy if there is improper delay between indictments. Thus, after stating that the time limits are inapplicable to the period between a dismissed initial indictment and a second indictment, it states (p. 33):

> The Committee is concerned that this provision not be used to evade the speedy trial time limits set out in this Act. The prosecutor should not be able to avoid the speedy trial time limitations when his carelessness in preparing the original complaint or indictment has resulted in a dismissal under this section. Therefore, when

We suggest with the utmost deference, for what we recognize is the sincere conviction of our colleagues who feel that a rehearing is not required, that as the opinions now stand, it cannot be said that, in setting aside this murder conviction on speedy trial grounds, we have fully covered and clearly resolved the critical threshold issue of "length of delay". This, after all, is an important case with wide public interest. Any opinion in the case should, we respectfully suggest, thoroughly canvas all the points raised, whether in the original hearing or by the petition for rehearing, and, by our opinion on those points, assure the defendant, the government and the public that we have not passed over in silence but have frankly and fully considered those points and reached a just result. This will be one of those rare cases in which a plea of a violation of the speedy trial right under the Sixth Amendment has been upheld. It thus behooves us not to dismiss in silence a serious point, sustained as it is by respectable authority and, by analogy at least, by Congressional action, and to set at naught the verdict of a jury which unanimously found the defendant guilty after an error-free trial. Rehearing and decision on the important point raised by the Government on whether the period between dismissal of the military "arrest" for want of probable cause and the actual indictment should be included in the compu-

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a judge dismisses an original information or indictment on other than speedy trial grounds he should, nevertheless, take into consideration the defendant's right to speedy trial under the statute and under the Constitution. For example, the judge might want to order that the original dismissal be with prejudice so that the prosecutor could not reindict several months after a carelessly drawn indictment has been dismissed.

tation of "length of delay" is, in our opinion, demanded in this case. We dissent from the failure to face the issue directly.

If our opinion is correct that the "length of delay" in this case was insufficient to "trigger" further inquiry into the claim of a violation of the speedy trial provision of the Constitution, it is unnecessary, as we have said, to consider the other factors set forth for consideration in *Barker*. We would remark briefly on these factors, however, on the assumption that, contrary to what we conceive the law to be, the Court could under a Sixth Amendment speedy trial claim, consider delay between the dismissal of the military proceedings and the return of the indictment. We shall accordingly discuss briefly the three factors listed in *Barker* other than the threshold one of length of delay.

The prevailing panel opinion fixes the delay attributable to the Government (the second factor to be considered under *Barker*) as that between the receipt of the CID report by the Department of Justice in 1972 and the date of the return of the indictment, or a period of two and one-half years prior to indictment. The CID report submitted to the Department consisted of thirteen volumes and innumerable documents. It was not a complete report and was so recognized by the CID for it suggested that the Department conduct additional investigations. Such a recommendation was understandable. The crime involved was both horrible and bizarre. The only eye witness was the defendant himself. Any prosecution was dependent upon the development of a convincing web of circumstantial evidence. This was a herculean task. And it was a task that the Government undertook seriously. It felt an obligation both to itself and

to the defendant to proceed with great care lest it err either in absolving a likely guilty party or in unfairly charging a seeming innocent party. In this effort to be thorough, it had the CID twice reopen its investigation in order to pursue additional evidence. The bodies of the deceaseds, the wife and children of the defendant, were exhumed in order that a hair test could be performed. The result of these tests was a critical point in the case. It is thus clear that this was not a simple case but one of infinite factual ramifications. Perhaps the Department could have moved with greater speed in investigating these facts. Unquestionably, there was some delay because of, what one court has characterized, as "institutional dysfunction." [12] But the delay from this cause was not substantial and it certainly was not prompted by any tactical or vindictive purpose, or anything other than a "benign" purpose. As such it is not given much weight in this context.[13]

The prevailing opinion suggests that the delay by the Department may have been "a disagreement between two groups in the Justice Department as to whether the case should be prosecuted" or "just simple government bureaucracy." For this latter statement the opinion seems to rely on a statement of an assistant district attorney that from the receipt of the CID report he thought the Government had enough evidence to prosecute. We give little or no weight to this fact. So far from being a criticism of the Department, this hesitancy on its part to proceed on the recommendation of the assistant district

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[12] *United States* v. *McGrath*, 622 F.2d 36, 41 (2d Cir. 1980).

[13] *Barker* v. *Wingo*, 407 U.S. at 530.

attorney without the most careful consideration of every contrary argument and circumstance is to be commended, not condemned. Often a zealous investigator or prosecutor wishes to rush in with a prosecution when others, less intense in their feelings and more balanced in their judgment, would wish further investigation and inquiry. We do not think we should establish any rule that when any zealous "eager beaver" investigator or assistant district attorney recommends prosecution, any delay by the Department of Justice in authorizing prosecution should be ascribed to bureaucratic bungling; nor should we want to criticize the Department for any delay when its delay was due to a desire to consider fairly the arguments of those opposed to prosecution. And this we take to be the opinion of the Supreme Court, as it was forcefully expressed in *United States* v. *Lovasco*, 431 U.S. 783, 790-91 795 (1977).[14]

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[14] In this case the Court said at pp. 790-91 and 795:

> It requires no extended argument to establish that prosecutors do not deviate from 'fundamental conceptions of justice' when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself'. . . .
>
> . . . . Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able

In short, we feel that, considering the complexity of this case and the difficulty of reviewing the many strands of circumstantial evidence involved, the Government was not guilty of excessive delay in beginning the prosecution.

Turning to the third *Barker* factor, it may be conceded that in this two and one-half year period during which the Department was proceeding with its investigation, the defendant was pressing the Department. Primarily, he sought to induce the Department to abandon the investigation, but he did ask that, if it were going to prosecute, to prosecute then. But it has been held that a putative defendant has no right to demand that he be arrested or that an investigation be abandoned.[15] The reason for this rule is that to uphold such a right would be to interfere improperly with the executive's discretion to investigate and to prosecute. See Judge Mansfield's opinion in *United States* v. *Hillegas*, 578 F.2d 453, 456-7 (2d Cir. 1978). Any contrary rule would enable any person under investigation to frustrate that investigation of his possible criminal conduct by demanding prosecution as soon as he hears that his conduct is under scrutiny. It is easy to see how such

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promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed'.

[15] *United States* v. *Lovasco*, 431 U.S. at 790-96. See also, *Hoffa* v. *United States*, 385 U.S. 293 (1966). ("There is no constitutional right to be arrested . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence . . ." which may be enough perhaps to establish probable cause, but not sufficient to prove someone guilty beyond a reasonable doubt.)

a rule would thwart the effective prosecution of many complex cases, for example, tax fraud cases, to mention but one instance of the rule's impropriety. Moreover, this contention is appropriately directed only to a claim of violation under the Fifth Amendment (due process) as distinguished from a speedy trial claim under the Sixth Amendment.

Finally, we turn to "prejudice," which is declared to be the most significant "factor" in the *Barker* litany.[16] *Barker* identified the three circumstances which could represent prejudice to the defendant in this context: they are (a) oppressive pretrial incarceration; (b) anxiety of the defendant; and (c) impaired defense. The first two can be quickly disposed of. The defendant suffered no oppressive incarceration, and "anxiety" is present in every prosecution. For that reason, "anxiety" standing alone, will not ordinarily support a claim of prejudice in an accused's defense, since, "[s]omething more than the normal anxiety that accompanies a trial is necessary to show a degree of prejudice." *United States* v. *Shepherd, supra*, p. 8; *United States* v. *Hill*, 622 F.2d 900, 910 (5th Cir. 1980); *United States* v. *Venella*, 619 F.2d 384, 386 (5th Cir. 1980). That leaves as the only basis for prejudice in this case a showing of

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[16] In fact, the Supreme Court, in reversing *MacDonald I* indicated quite clearly, if we read correctly its opinion, that the question of prejudice was one to be analyzed and ruled on by the district judge, who had the benefit of the full record as well as the best opportunity to evaluate the credibility and weight to be accorded the evidence, and that his judgment was only to be reversed for clear error. The district judge in this case did so rule but the prevailing opinion of our court gives no weight to this ruling of the district judge. We believe that, in so dismissing without comment the district judge's action, the prevailing opinion has not followed the suggestion of the Supreme Court.

impaired defense. And this does not mean vague claims of prejudice or an assertion of speculative prejudice; it means a showing of actual prejudice to the defendant's defense. This was spelled out by the Court in *Hill* v. *Wainwright*, 617 F.2d 375, 379 (5th Cir. 1980), in which a claim of a speedy trial violation was dismissed because the defendant had "failed to demonstrate *actual* prejudice." (Emphasis added) Judge Bryan's dissenting opinion in MacDonald II demonstrates convincingly why there was no actual prejudice of the defense by the delay prior to indictment. There were many witnesses at the trial. The defendant points only to one witness whose failure to recall, he claims, was prejudicial to his defense. This witness was in such a mental condition that she could not supply any information pertinent to the trial. This was not, however, a condition which developed as a result of any delay in either the investigation or the prosecution of the defendant. From the first interview of this witness shortly after the murders on through all the investigations and post-indictment maneuverings up to actual trial, her mental condition was the same; she could recall nothing relevant to the case. Without any real prejudice, the defendant had neither a Fifth Amendment due process violation nor a Sixth Amendment speedy trial violation.

It is possible that some members of the Court may have been influenced against the request for *en banc* rehearing, as filed by the Government, because the primary point on which rehearing was requested was one which the Government had not earlier identified specifically on the first appeal in this case and was not pressed particularly on initial argument on this appeal. The failure of the Government to have expressly brought out the point on the first appeal may make our failure earlier to consider it understand-

able (one of those concurring in this dissent pleads such excuse) but when, by the petition for rehearing on this appeal, the point is clearly raised, with supporting authority, and the point, if sustained as the Government contends it should be, is dispositive of the critical threshold issue of length of delay under the speedy trial plea, we do not believe the failure of this court even to consider or decide the point is understandable. Whether cited to us early or late, we should not decide cases by dismissing out of hand relevant decisions dispositive of a critical issue in the case. And, if this point pressed by the petition for rehearing by the Government, is tenable, as we feel it is, it requires a reconsideration of all the factors which *Barker* says should be considered in this context. What we strongly object to is the failure even to consider, much less to come to grips with, what we conceive to be a dispositive issue in this case.

In summary, we are convinced that, properly computed, there was not such "length of delay" in this prosecution as to "trigger" inquiry on speedy trial constitutional grounds under *Barker* v. *Wingo*. This fact is made clear in the Government's petition for rehearing. Since the panel opinion is to the contrary, *en banc* rehearing is necessary to correct that error in the panel's opinion.

Though the above point as raised in the petition for rehearing is, in our opinion, dispositive of this case, we are equally convinced that the defendant in this case has not satisfied the requirements of the other factors listed in *Barker* for the granting of a dismissal on speedy trial grounds under the Sixth Amendment.

We accordingly dissent from the denial of rehearing *en banc* by an equally divided vote in this case.

MURNAGHAN, Circuit Judge:

It had been my intention to abide by the customary disposition, a simple indication that the request for rehearing *en banc* had failed for want of a majority vote. In view of the dissent filed by Judges Russell, Widener, Hall and Phillips, however, two additional points should be made.

First, I apologize to my colleagues for the error in langauge in the panel opinion to which the dissent, in footnote 6, calls attention. I erred when I stated that "[t]he offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the military arrest and trial." Properly, I should have stated: "[t]he offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the conclusion of the military proceedings in October 1970, and the indictment in January, 1975."

Elsewhere the panel opinion confirms that the panel majority did not include time beyond January 1975 for purposes of considering the speedy trial issues.

Second, the reiterated reference in the dissent to the trial in the case as "error-free" is premature and may not be correct. The panel majority was at pains to point out that it did "not reach the district judge's conduct and rulings at trial. . . ." Whether the trial was "error-free" is simply a matter not yet addressed.

Finally, since I have felt compelled to write something, I should not pass, in complete silence, the dissent's principal plaint: its contention that time between dismissal of an indictment (or its equivalent) and the processing of a subsequent indictment should

not count for purposes of determining whether a speedy trial has been denied. Few, if any, absolutes exist in our judicial system. Each case presents its peculiar difficulties. While in at least one case, *United States* v. *Martin*, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977), the Court said that the interval should not count, it did not say that it would never count. Here the situation was such that, from October 1970 (when the military proceedings concluded with a dismissal) until indictment in 1975, MacDonald's possible involvement was not dormant. The immense publicity and the continued inquietude because the matter was not put to rest engaged the tenets of the Sixth Amendment.

For authority applicable to this particular case, the decision in *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976), is more compelling than a decision on different facts in another circuit. *See* especially 531 F.2d at 202: "Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDENT

[Filed Sept. 14, 1979]

ORDER

Convicted by a jury of three counts of murder and sentenced by the court to three consecutive life sentences the defendant, Jeffrey R. MacDonald, through his counsel moved in open court immediately following pronouncement of judgment to be permitted to remain on bail pending appeal. The motion was denied initially but without prejudice to defendant's right to reduce the motion to writing and support it with further authorities and argument. This has now been done and two informal hearings attended by counsel for defendant and the government have been held. The court's final decision not to allow bail pending appeal was announced on September 7, 1979, and the reasons supporting this conclusion will now be recorded.

Although the government did not seek the death penalty in this case, the statute under which it was prosecuted still provides for such penalty, and traditionally bail has not been allowed in capital cases. The Bail Reform Act of 1966, 18 U.S.C. §§ 3146,

et seq., however, provides for release on bail of persons convicted of a capital offense who have filed an appeal in accordance with the provisions of 18 U.S.C. § 3146 "unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . or if it appears that an appeal is frivolous or taken for delay. . . ." 18 U.S.C. § 3148. While it is true that this defendant is a well established professional man (a doctor) and has never heretofore failed to meet all court appearances, the situation with which he is now confronted is, of course, far different from that which has heretofore obtained. As a highly skilled physician the defendant presumably would have no difficulty at all in finding employment in any one of the many countries in the world which do not have in effect extradition treaties with the United States, and the temptation to seek refuge in another country would certainly be great indeed in this case.

Even so, the court would be reluctant to keep this defendant imprisoned while awaiting appeal if the court were convinced of the possibility of serious, reversible error in defendant's trial. Defense counsel were therefore requested to set forth in their written motion for bail those assignments of error on which principal reliance would be placed in the appeal, and in their motion they have listed some sixteen or more allegations of error only a few of which the court has deemed worthy of comment.

The cornerstone of defendant's legal defense remains his claim that he was denied his constitutional right of a speedy trial in the case. Quite correctly he points to the fact that the initial ruling of this

court denying his motion to dismiss based on speedy trial grounds was reversed in a split decision by the Fourth Circuit almost four years ago. *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976). But the Supreme Court held that the Fourth Circuit lacked jurisdiction to entertain MacDonald's speedy trial appeal, and the case was eventually remanded to this court for trial. 435 U.S. 850 (1978). After referring to the four factors to be weighed in determining whether an accused has been deprived of his constitutional right to a speedy trial as set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, whether defendant has asserted the right and prejudice to defendant from the delay) the Supreme Court stated that prejudice to the defendant from the delay was the most serious and went on to say:

> "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pre-trial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can be better gauged—would also be denied. Hence, pre-trial denial of a speedy trial claim can never be considered a complete, formal and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily 'remains open, unfinished (and) inconclusive' until the trial court has pronounced judgment." *Id.*, 435 U.S. 858-9.

In the light of the Supreme Court's decision this court summarily overruled defendant's renewed motion to dismiss on speedy trial grounds again interposed at the pre-trial conference held on July 14,

1979. At that time the defendant took the position, to which he apparently still strongly adheres, that since the Fourth Circuit has already expressed its opinion on the speedy trial issue notwithstanding its decision was overturned later on jurisdictional grounds, it is a foregone conclusion that the case will again be dismissed on these grounds when it reaches the Fourth Circuit on appeal. This court does not believe that this result necessarily follows, and it is noted in the inception that following the court's order of July 14, 1979 the defendant promptly petitioned the Fourth Circuit for a writ of mandamus asking that the indictment be dismissed on speedy trial grounds which petition the Fourth Circuit just as promptly rejected.

Accordingly, the case has been tried to a jury in this court in a trial lasting six and one-half weeks during all of which time this court has been alert to detect the existence of any of the four factors required to be considered under *Barker* v. *Wingo*, *supra*, in determining the speedy trial issue. The length of the delay between the time of the crimes and the return of the indictment, almost five years, is, of course, fixed and indisputable, and although the government's explanation for much of the delay is not without plausibility, the impression remains that the case could have been put before the grand jury at a much earlier date than it was. There is also some evidence that the defendant expressed the desire to have the case brought to a head one way or the other much earlier than the time the indictment was returned. The assertion of a right to a speedy trial, however, is normally understood to refer to a right to a trial by one who has been indicted and is subject to a trial rather than to a right to have the govern-

ment to accelerate its efforts to obtain an indictment. It will be remembered, of course, that the four-and-a-half-year delay which followed the indictment was attributable almost entirely to the pursuit by defendant of innumerable motions, appeals and attempted appeals, all of which were ultimately resolved against him.

Essentially, then, the question involved here is whether the defendant has been prejudiced by pre-indictment delay. As stated in *Barker*, this question must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

While the Fourth Circuit in its original consideration of the speedy trial issue seemed to equate the defendant's restriction to quarters during the time the case was under investigation by the Army authorities with "pretrial incarceration," Judge Craven in his dissenting opinion in that case pointed out that the conditions under which defendant was restricted were far from burdensome. He apparently was able to go to and from his meals, to play golf and to have a feminine companion to visit him in his quarters from time to time, amenities certainly not enjoyed by one incarcerated in a jail awaiting trial. He apparently continued to draw his full pay without having to work, a privilege which few, if any, persons incarcerated awaiting trial ever enjoy. This court cannot see that there has been any "oppressive pretrial incarceration" in this case.

The anxiety and concern, if any, of this defendant would involve his subjective feelings, and while it can

certainly be assumed that he would have much preferred to know that the matter had been finally put to rest, the evidence is that following his honorable discharge from the Army and a short return to his home in New York he moved to California where he promptly established himself in the practice of his profession and acquired a wide host of friends both professional and social. The record would not support a finding that this defendant has suffered great anxiety and concern by reason of the pre-indictment delay in this case.

The fears expressed by the Fourth Circuit in its 1976 decision that the defendant's ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial. Almost incredibly, the only material witness on either side of the case shown to have died was a government witness, and not only were all of defendant's original witnesses shown to be available to testify, but he was also able to produce one or more witnesses who were not even known to the defendant until recent times and who gave testimony vital to the defense. In addition the defendant was able to have the benefit of the testimony of several highly competent expert witnesses who were not known to or available to him at the time of the Army hearing in 1970. Finally, by reason of the excellent record he has made in the practice of his profession in California in the last seven or eight years defendant was able to produce a most impressive array of character witnesses none of whom would have been available to him had he been brought to trial within a year or two after the crimes were committed.

Significantly, in none of his motions based on speedy trial grounds has the defendant alleged any

particular in which his defense has been prejudiced in the least by delay. Contrarily, this court is of opinion that the delay may very well have worked in defendant's favor in that juries are not known to look with favor on stale claims, and there was no way that the jury in this case could have known that approximately one-half of the delay here was attributable to actions taken by the defendant himself rather than the government. Be this as it may, the court finds that the defendant's ability to defend this case adequately was not prejudiced by any of the delay, pre-indictment or otherwise, and that his speedy trial claim should be denied.

Since the court's instructions to the jury were not objected to by either party at the trial and defendant has pointed to nothing in the instructions which might conceivably constitute plain error, it is assumed that defendant's principal claim of prejudicial error during the course of the trial will center around the court's alleged erroneous evidentiary rulings. The two principal exceptions taken were to the court's refusal to admit testimony of witnesses to statements made out of court by the defendant's witness, Helena Stoeckley, and its refusal to admit the testimony of a psychiatrist, one Dr. Sadoff. The bases of the court's rulings on these two questions were dictated into the record at trial, see Transcripts for August 20, 1979 (Stoeckley) and August 22, 1979 (Sadoff), but it was indicated at the time that the court might elaborate further on its rulings in writing as soon as time should permit. This will now be done.

The Stoeckley Witnesses. Helena Stoeckley, an acknowledged drug addict, was living in Fayetteville at the time of the murders in question in February, 1970, as a fairly well-known member of the drug

culture. Colonel Rock, who conducted the Article 32 proceedings for the Army in 1970, had recommended that Stoeckley be investigated as a possible suspect in the MacDonald murders. Apparently this was based on the fact that this drug-addicted girl had engaged in some rather bizarre behavior shortly after the murders and had been unable to account for her whereabouts for about four hours on the early morning of February 17, 1970, during which time the murders occurred. She reportedly made statements to the effect that she thought she might have been in the MacDonald home at the time of the crimes, and there was evidence to the effect that she obtained some funeral wreaths from a florist shop near her residence and wore black for a while as if she were in mourning for the murder victims. There was also evidence that she had a long blond wig and a "floppy" hat and boots which in some respects seemed similar to those allegedly worn by one of the intruders claimed by defendant MacDonald to have committed the murders of his wife and two young daughters.

Stoeckley was located during the course of the trial at a place in South Carolina near Greenville and because of her reluctance to come to court in obedience to a subpoena the court ordered her taken into custody and brought to Raleigh to testify on behalf of the defendant. Upon her arrival counsel for defendant asked for a short recess to interview Stoeckley, and this stretched into almost an entire day of conferences between defense counsel, Stoeckley and a number of witnesses to whom she had allegedly made statements of one kind or another over the nine and one-half years which have elapsed since the murders in which she would indicate some possibility of her own involvement in these crimes.

On the following day Stoeckley was put on the stand by defense counsel and questioned at considerable length about her knowledge of the MacDonald murders. The substance of her testimony was that she was not involved in the murders but that because of her drug-crazed condition she had at least come to wonder whether or not she was in fact involved, and she admitted to owning the clothing referred to above and the fact that she seemed to go into mourning following the murders. The court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced mental distortion and that she could be of no help to either side in the case.

The defendant next took the voir dire testimony of a half dozen or more witnesses to whom Stoeckley had made statements relating to the MacDonald murders beginning with a Fayetteville detective who interviewed her within a few days after the murders and ending with witnesses including members of defense counsel's staff who interviewed Stoeckley on the day she arrived in Raleigh to testify.

Several of these witnesses talked to Stoeckley in Nashville, Tennessee where she was living in the fall of 1970 and the early part of 1971. When she would talk to these witnesses she would sometimes be "hysterical", "crying", and "blubbering". She would say things like "I don't know whether I did it or not." She told one witness that she remembered being at the MacDonald home, that she knew who did it but that she did not do it herself, that she remembered nothing about the evening, that MacDonald himself did the killings and that she was unable to describe anything inside the MacDonald apartment. She was under the influence of drugs at times when she talked

to this witness but at other times she was not under the influence of drugs. She was interviewed by a CID agent on April 23 and April 24 of 1974 and told him that she was convinced that she had participated in these crimes for three or four months but was now of the opinion that she was present but did not participate. She was under the influence of narcotics the first day she talked to the CID agent but was "better" on the next day when she retracted everything she had told the agent on the previous day. This agent was unable to develop any information from Stoeckley showing that she really had any knowledge of the crime, and all the possible leads she was able to furnish were checked out and it was verified that the persons named by her were not involved.

The Fayetteville detective, one Beasley, interviewed Stoeckley at her home in Fayetteville between 2:30 and 3:00 a.m. on the morning of February 18, which was the day following the murders, and she told him at that time "in my mind it seems that I saw this thing happen," but she stated further that she was under the influence of the drug mescaline at the time and that she then backed off and would say no more. This officer held Stoeckley and several of her male companions for about an hour that morning after requesting his headquarters to contact the CID and have them come and interview these people, but when the CID agents did not arrive in about an hour the detective released these people and has never seen them again. Curiously, this officer's notes of his interviews with Stoeckley and her companions were lost or misplaced, and he has never seen them again. If it is within the province of this court to pass on the trustworthiness of a witness who proposes to

testify as to statements of another witness allegedly qualifying as an exception to the hearsay rule, see *United States* v. *Satterfield*, 572 F.2d 687 at p. 69 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 128, this court would be contrary to hold Officer Beasley's testimony to be unreliable. It is simply incredible that any self-respecting, competent police officer who really thought he had a substantial lead toward solving these sensational murders would allow the suspects to go after waiting only an hour for the Army investigators to come when he had had no direct contact with them himself and that he would never again pursue the lead on his own.

Statements allegedly made by Stoeckley to her neighbor, one Posey, were of the same equivocal character as the statements sought to be proven by the other witnesses referred to above. For reasons which were brought out more fully by the government's cross-examination of this witness, if required to do so this court would find his testimony untrustworthy.

The defendant sought to introduce testimony of these out-of-court statements by Stoeckley as exceptions to the hearsay rule under Rule 804(b) of the Federal Rules of Evidence, contending that they qualified as statements against Stoeckley's penal interest in view of Stoeckley's "unavailability as a witness." In view of Stoeckley's testimony that she had no recollection of the subject matter of at least some of her statements, the court was prepared to rule that she qualified as an unavailable witness under Rule 804(a)(3), and although it is a debatable proposition, the court was willing to assume arguendo that the statements were against Stoeckley's penal interest. The trouble with the proffered testimony, however, lies in its failure to meet the test of the second sentence of Rule 804(b)(3) which reads as follows:

> "A statement tending to expose the declarant to criminal liability and offer to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

After studying the transcript of Stoeckley's own testimony and that of the proposed witnesses given on voir dire the court was convinced that far from being shown by corroborating circumstances to be clearly trustworthy, the alleged statements of Stoeckley were so clearly untrustworthy that the court should not hesitate to exercise its discretion to exclude the evidence under Rule 403, F.R.E., which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

That the determination of admissibility under Rule 804(b)(3) is left to the discretion of the trial court is hardly open to question, *United States* v. *Guillette*, 547 F.2d 743 (2nd Cir. 1976); *United States* v. *Ropeza*, 564 F.2d 316, 325 (9th Cir. 1977), and the standard for appellate review is whether or not the discretion was abused. *United States* v. *Bagley*, 537 F.2d 162, 166-167 (5th Cir. 1976).

The closest case on the facts which the court was able to find was *United States* v. *Satterfield*, 572 F.2d 687 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 128. In that case the witness took the Fifth Amendment and therefore made himself unavailable. In sustaining the trial court's ruling excluding testimony about an

alleged statement made out of court by the witness because clear circumstances corroborating the veracity of the witness were absent, the court listed some of the circumstances which tended to corroborate the trustworthiness of the statement and others which indicated that the statements were untrustworthy. The court said:

> "Under Rule 804(b)(3), the corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must *clearly* indicate it. There is good reason to believe that [the witness] staged the argument with [the defendant's] help and that his alleged statements . . . were also fabricated. The trial court did not abuse its discretion in denying [defendant's] motion to admit this evidence." *Id.* p. 693.

In assessing the trustworthiness of statements of the kind sought to be introduced here the court must inquire into the reliability of and the necessity for the statement. *United States* v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914. Here the statements of Stoeckley were anything but reliable, and no necessity for her making the statements was ever shown. To the contrary, it appears that for the most part the statements were made by her voluntarily while she was under the influence of powerful narcotics.

The case relied upon by defendant, *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), is clearly distinguishable. In that case the hearsay statements of the declarant were originally made and subsequently offered at the trial under circumstances that provided assurance as to their trustworthiness. The statements

consisted of the confessions made spontaneously by the declarant to a close acquaintance shortly after the crime had occurred; the statements were corroborated by other evidence in the case including the declarant's sworn confession which he later repudiated, the testimony of an eye witness to the murder, the testimony that the declarant was seen with a gun immediately thereafter and proof that the declarant owned a weapon of the kind involved in the crime. Moreover, "[t]he sheer number of independent confessions provided additional corroboration for each" and "each confession here was in a very real sense self-incriminatory and unquestionably against interest." 410 U.S. 300-301. Nothing remotely resembling such corroborating circumstance is present in the case at bar.

As an alternative ground for the admission of the out-of-court statements of Stoeckley defendant argued that the statements were admissible for impeachment purposes under Rule 613, F.R.E. The court had the definite feeling that the real purpose of counsel in endeavoring to get the evidence in as impeachment was simply to get it before the jury, and if this is so the evidence was properly excluded under *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975), where it was said:

> "The overwhelming weight of authority is . . . that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."

In that case it was recognized that the danger of confusion, even where the evidence is limited to impeachment, may be so great as to upset the balance

and warrant its exclusion. Authority for exclusion of such evidence is now contained in Rule 403, F.R.E.

The court chose to exclude the evidence on other grounds. To begin with, in order to impeach a witness by a prior statement there must in fact be testimony which is inconsistent with the prior statement. *Gilmour* v. *Strescon Industries, Inc.*, 66 F.R.D. 146 (E.D.Pa. 1975), *aff'd*, 521 F. 1398 (3rd Cir. 1975).

> "Any statement is inconsistent if under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness has said." 3 Weinstein's Evidence, 613-11.

The alleged statements made by Stoeckley are in some instances at variance with her sworn testimony given at the trial in this case, but by the same token the statements in some respects are entirely consistent with testimony given at the trial by Stoeckley. And so we were simply left with conflicting statements made by Stoeckley to the same witness, and to have allowed such statements to be admitted could only have added to the confusion already engendered by her own vague and totally untrustworthy testimony which she had given from the witness stand.

The Psychiatric Testimony. The defendant proffered the testimony of a forensic psychiatrist, Dr. Robert L. Sadoff, who apparently proposed to give testimony as follows:

> "That it is recognized and accepted by reputable specialists in the field of forensic psychiatry that certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain

types of anti-social conduct, including the commission of homicides involving extreme brutality to one's own spouse and small children and other crimes of violence; and that, conversely, other personality/emotional configurations are identifiable which are inconsistent with such anti-social behavior.

"That based on his psychiatric examination of the defendant, it is his opinion of the character of Dr. MacDonald that the defendant was and is a man who is not given to extraordinary violent outbursts of physical violence against his wife and children; that he was and is an emotionally normal, mentally stable man, neither evasive nor apparently untruthful about the significant events of his life, including the murders of his family, who did not possess the type of personality/emotional configuration that would be consistent with and/or manifests this type of murderous assault on his wife and small children."

This evidence was sought to be introduced under Rule 404(a)(1) of the Federal Rules of Evidence which declares admissible evidence of a pertinent trait of the character of an accused for the purpose of proving that he acted in conformity therewith on a particular occasion. Defendant contended that the proffered psychiatric testimony would show that the defendant "was a well-adjusted man, without violent tendencies" and would "establish a personality configuration inconsistent with the outrageous and senseless murders of defendant's family."

Numerous lay witnesses most of whom were highly intelligent and articulate professional and business people, had already testified to the defendant's character traits of peacefulness, non-violence, rationality

and compassion for his fellow man, but it was the position of the defendant that the opinion of a qualified psychiatrist based on his examination of the defendant might well be more reliable evidence of character than that of even the most perceptive lay observer. Defendant points to a note by the Advisory Committee to Rule 405, F.R.E., which he contends expressly sanctions the introduction of such psychiatric opinion testimony. The note reads in pertinent part as follows:

> "If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion."

In ruling on the admissibility of this proffered expert testimony the court indicated that it would allow testimony by Dr. Sadoff as to the defendant's character traits such as peacefulness and non-violence which would be inconsistent with the commission of the crimes in question, but that it had been concluded following a study of the pertinent authorities that the proffered testimony to the effect that "certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain types of anti-social conduct including the commission of crimes of the type here involved" should not be admitted. Several reasons led the court to this conclusion.

The legal principles applicable have been stated in *United States* v. *Amaral*, 488 F.2d 1148 (9th Cir. 1973), as follows:

> "The basic purpose of any proffered evidence is to facilitate the acquisition of knowledge by the triers of fact thus enabling them to reach a final determination. As often stated, our system of evidence rests on two axioms: Only facts having rational probative value are admissible and all facts having rational probative value are admissible unless some specific policy forbids. . . . Evidence which has any tendency in reason to prove any material fact has rational probative value.
>
> "The general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony. . . . The balance of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the 'broad discretion' of the trial judge and his action will not be disturbed unless manifestly erroneous. . . .
>
> "The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admission will (1) require undue consumption of time, (2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, (3) or unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. Scientific or expert testimony particularly courts the second danger because of its aura of special reliability and trustworthiness.

> "Because of the peculiar risks of expert testimony, courts have imposed an additional test, i.e., that the testimony be in accordance with a generally accepted explanatory theory." *Id.*, p. 1152.

The court assumed that Dr. Sadoff could qualify as an expert in in forensic psychiatry, but proof that his proffered testimony would conform to a generally accepted explanatory theory was lacking. In his brief the defendant cited several articles in psychiatric journals which were said to deal with this subject, but the articles were not made available to the court, and with the possible exception of the case of *United States* v. *Staggs*, 553 F.2d 1073 (7th Cir. 1977), the court was not cited any case decided under the Federal Rules of Evidence supporting the admissibility of psychiatric testimony of the type sought to be introduced here. The government, on the other hand, has cited an article by an Assistant Professor of Psychiatry at UCLA entitled "A Critique of the Psychiatrist's Role as Expert Witness," 12 Journal for Science 172 (1967), from which the following quote is taken:

> "It is not possible, nor is it likely in the near future, for a psychiatrist who first sees the patient some time, often months, after the offense, to give specific information about the mental state of the defendant at the time of the offense. However, the moment that the psychiatrist is pressed to give his opinion, which is no more than his personal guess or moral conviction, there suddenly appears something interpreted as tangible and scientific. Under the guise of science, part or all of the responsibility for the difficult issue of criminal responsibility is thus handed over to the psychiatrist."

Evidence is not necessarily admissible simply because the witness purports to base his testimony on an ostensibly scientific principle. The principle must be sufficiently established to have gained general acceptance in the particular field to which it belongs. *United States* v. *Brown*, 557 F.2d 541, 556 (6th Cir. 1977). Moreover, the opinion of an expert because of its seeming objectivity is apt to carry undue weight, so not every ostensibly scientific technique should be recognized as the basis of expert testimony. *United States* v. *Baller*, 519 F.2d 463, 466 (4th Cir. 1975).

> "In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts." *Id.*, p. 466.

In *United States* v. *Brown*, *supra*, the court rejected the government's proffered expert testimony demonstrating that ion microprobic analysis of human hair had reached a level of general acceptance in the field to make it a sufficiently reliable and accurate means for expert identification of hair. The court said:

> "While it is a truism that every useful new development must have its first day in court. . ., expert testimony on a critical fact relating to guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in the scientific community and it not mere speculation or conjecture." *Id.*, pp. 558-9.

Our case here was further complicated by the fact that the government's own forensic psychiatrist had examined the defendant and had reached conclusions diametrically opposed to those of Dr. Sadoff. The report of this expert which has been furnished counsel for defendant and to the court for its in camera review tends to indicate that the defendant does indeed possess those traits of character which are consistent with his commission of the crimes with which he is charged and that he possesses other traits which tend to cast serious doubt on the credibility of his explanation of how the crimes occurred.

The result was that we had shaping up a "battle of the experts" referred to by Weinstein in his work on *Evidence*, Section 405[03], 405-34, where he quotes from an article by Falknor and Steffen entitled "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist' ", 102 Univ. of Pa. L.Rev. 980, 994 (1954) as follows:

> "Even in the case of strictly medical testimony, where the issue concerns physical rather than mental or psychological condition or disability—'objective' rather than 'subjective' symptoms—experience has demonstrated the commonness of disagreement among the 'experts.' When the inquiry is centered on an intangible, impalpable, wholly subjective thing like state of mind, personality or 'propensity,' the likelihood of disagreement is greatly enhanced. Thus there is point to the conclusion of the New Mexico court to the effect that it was 'unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions,' to the 'bewilderment of the fact finder.' "

In view of all of these considerations the court concluded that irrespective of the admissibility of the proffered evidence under Rules 404 and 405, F.R.E., the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury and that it should be excluded under Rule 403. See further Wright & Graham, *Federal Practice & Procedure*, § 5265.

The defendant's proposed assignment of error based on the denial of defendant's motion for judgment of acquittal made at the close of the government's evidence (but not renewed, as the court recalls, at the close of all the evidence) is considered to be without merit. Although the introduction of evidence by the parties extended over the better part of six weeks and encompassed much highly technical and scientific evidence on each side, the one central question involved in the case from the beginning to the end was whether the jury would believe the defendant's story that the murders had been committed by four intruders who entered his home through an unlocked back door in the early morning hours of February 17, 1970. Selection of this jury extended over a period of three days, and while in the court's view the parties were entitled to only ten challenges each, at their insistence they were allowed twenty challenges each as provided in capital cases involving the death penalty. The result was the selection of a jury panel composed of intelligent, conscientious citizens from almost every walk of life who were obviously imbued with a serious sense of responsibility and who gave the case their undivided attention throughout the unusually long trial. Counsel for both sides agreed that it was a good jury, and the six and one-half

hours of deliberations which they required to reach a verdict demonstrates that their task was not taken lightly. This jury obviously declined to accept Dr. MacDonald's story, and the result was the return of the guilty verdict. The court remains of opinion that the verdict was fully supported by the evidence and that the denial of the motion for judgment of acquittal was proper.

The court has considered the twelve additional proposed assignments of error relating principally to evidentiary rulings, and it would serve no useful purpose to examine these seriatim at this time. Suffice it to say that in those instances where objections were properly lodged and an explanation for the court's ruling was considered appropriate, the same will appear in the transcripts of the trial and the pre-trial proceedings. The court remains of opinion that these rulings were proper.

The court is fully cognizant of the fact, of course, that it is not its province to sit in appellate review of itself, and the elaboration herein on what it understands to be defendant's principal proposed assignments of error is intended only to comply with the court's intention expressed at trial to explicate some of its rulings more fully as soon as time should permit and to state additional reasons as to why the court has concluded not to allow bail pending appeal.

In summary, the court remains of opinion that no one or more conditions of release will reasonably insure that the defendant will not flee and that while defendant's appeal is certainly not frivolous, he has failed to demonstrate to this court that it has sufficient legal merit to create in the court a genuine concern that defendant will have wrongfully been held in custody pending his appeal. His motion for bail

must therefore be and is hereby denied.

SO ORDERED as of September 7, 1979.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDANT

[Filed Sept. 14, 1979]

ORDER

Following the entry of judgment in this case the defendant filed on September 4, 1979, a motion pursuant to 28 U.S.C. § 2855 (ostensibly Section 2255) and Rule 48(b), F.R.Crim.P., to vacate the judgment of conviction and to dismiss the three-count murder indictment against defendant based on the government's alleged violation of defendant's right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. The government has filed a response to this motion on September 12, 1979.

Similar motions have been filed by defendant on several previous occasions prior to judgment, and on each occasion this court has overruled the motions.

For the reasons stated in the court's order denying bail entered as of September 7, 1979, this latest motion must also be and is hereby denied.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

September 14, 1979.

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